TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 492.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

MRS. NORA M. JONES, ADMINISTRATRIX OF THE SUCCESSION OF T. A. JONES, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED JUNE 11, 1915.

(24,771)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1915.

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1 (*Præcipe of Counsel.*)

Supreme Court, State of Louisiana.

No. 20144.

Mrs. NORA M. JONES, Administratrix,
vs.
KANSAS CITY SOUTHERN RY. CO.

In the above entitled cause, the Clerk of the Supreme Court is hereby directed and requested to include in the transcript for the writ of error to the Supreme Court of the United States, the following documents only:

1. Amended and supplemental petition.
2. Petition.
3. Answer.
4. Defendant's bill of exception.
5. Judgment of District Court.
6. Motion to strike out.
7. Motion for new trial.
8. Petition and bond for removal.
9. Plaintiff's Bill of exception.
10. Exhibit "A."
11. Exhibit "B."
12. Exhibit "C."
13. The oral testimony taken on the trial of the case.
14. Opinion and decree of the Supreme Court.
15. Defendant's application for rehearing.
16. Opinion of the Supreme Court on application for rehearing.
17. Petition and assignment of errors with bond and writ of error to the Supreme Court of United States.

Respectfully submitted,

(Signed) ALEXANDER & WILKINSON,
Attorneys for the Defendant.

We have been served with a copy of the above.

(Signed) BLANCHARD & SMITH,
" OTIS W. BULLOCK,
Attorneys for the Plaintiff.

(Endorsed on Reverse:)—No. 20144—Supreme Court of
2 Louisiana—Kansas City Southern Ry. Co., Plaintiff-in-error, vs. Mrs. Nora M. Jones, Administrator, defendant-in-error.—Præcipe of Counsel—Filed May 24, 1915—(Signed) Paul E. Mortimer, Clerk.

3 (*Petition.*)

To the Honorable Judges of the First Judicial District Court in and for Caddo Parish, Louisiana:

I.

The petition of Mrs. Nora M. Jones, Administratrix of the Succession of T. A. Jones, being No. 15967 of the docket of this Honorable Court, bringing this suit in behalf of herself individually as widow of Thomas A. Jones and for the minor children, Alice, Margerie, and John Edward Jones, issue of her marriage with the said Thomas A. Jones, deceased, and W. H. Jones and Orien Jones, issue of T. A. Jones' prior marriage, with respect represents:—

That the Kansas City Southern Railway Company, a corporation incorporated under the laws of the State of Missouri, doing business in the State of Louisiana, with T. Alexander, a resident of Caddo Parish, Louisiana, as its designated agent upon whom service of process should be made, is justly and legally indebted unto your petitioner in the full sum of Thirty Thousand Dollars with legal interest from the date of judgment until paid, for the reasons and in the manner hereinafter alleged.

II.

Petitioner shows that the Kansas City Southern Railway Company operates a railroad from Kansas City, Mo., through the States of Missouri, Oklahoma, Arkansas, Louisiana and Texas to its terminus at Port Arthur, Texas; that it is an interstate railroad doing an interstate business, and that Thomas A. Jones was a locomotive engineer and that he was in the employ of defendant in said capacity on or about the 6th day of November 1911, and for several years prior thereto; that on said date he was in charge of defendant's engine, pulling its passenger train from Texarkana, in the State of Texas to Shreveport, in the State of Louisiana, and thereby engaged in the work of an interstate carrier engaged in interstate commerce.

III.

Petitioner shows that the said train on which the said Thomas A. Jones was engaged as engineer aforesaid was due to arrive in Shreveport about seven o'clock at night; that while thus in the

4 active discharge of his duties as locomotive engineer for defendant, on the said 6th day of November, 1911, as aforesaid, the defendant, its agents and employees negligently and carelessly released one or more freight cars, loaded with lumber from defendant's switch engine, or through carelessness or recklessness in making what is commonly known as a "flying switch", (knowing at the time the passenger train upon which the said Thomas A. Jones was engaged as locomotive engineer would soon be due), near said defendant's shops in West Shreveport, La., causing said cars to run down a steep grade of the main line of defendant's

track, at a terrific rate of speed, to a very dangerous curve in said track about three miles from Shreveport, La. The approach of the said cars in this way was obscured by the curve, and the said freight cars then and there collided with the said incoming passenger train, completely destroying its engine, and killing the engineer, Thomas A. Jones.

IV.

Petitioner shows that the said Thomas A. Jones met his death with great heroism, for after seeing the rapidly approaching cars, that foretold an inevitable collision, that he, mindful of the human lives he had in his keeping as locomotive engineer of defendant's passenger train, with death only a few seconds away, the said Thomas A. Jones remained at his post and applied all the means at his command to stop his train, and that his prompt and heroic action saved the lives of those upon the train, at the cost, however, of his own life. That so conspicuous was the heroic act of the said Thomas A. Jones, that his act was mentioned for the national award or prize annually given for the most conspicuous acts of heroism that are recorded during the year.

V.

Petitioner shows that the one or more cars that got away from defendant, its agent or employees as aforesaid had no one in charge of the same or if anyone was in charge of said cars they abandoned the same before the collision aforesaid; that the said cars were out of repair at the time and without the use of safety appliances required by law and which are necessary and customarily used in bringing such cars to a stop, and that if any one was on the said cars he was powerless to stop the same on account of the defective condition of said cars. That defendant, its agents and employees were guilty of gross negligence in using the said cars under such circumstances and in the manner aforesaid.

VI.

Petitioner further avers that defendant's freight cars, which caused the collision and wreck resulting in the death of the said Thomas A. Jones, as heretofore alleged, were defective and in bad order, being without brakes and other safety appliances required by law, at the time of said wreck, that said cars had been placed by defendant upon one of its side tracks on the south side of its main line, near its shops in West Shreveport, La., for the reason that they were in bad order; that defendant, on the 6th day of November, 1911, just before the arrival of passenger train being pulled by engine in charge of the said Thomas A. Jones, removed said cars from their position aforesaid, running them out upon the main line of its track, and unsuccessfully attempting to effect a flying switch with said cars, with the view of placing them upon another of its side-tracks north of its main line; that said cars were thus released and permitted to run wild down the main line of defendant's track, causing the wreck

hereinbefore mentioned; that defendant, its agent and employees were guilty of gross negligence in thus removing said cars out upon the main line of its track at the time and in the manner aforesaid.

VII.

Petitioner further shows that defendant should have maintained a derail near the long incline of its track, just beyond its shops in West Shreveport, La., to prevent cars from running wild down the main line of its track, and that its failure to do so was gross negligence; that the collision and wreck which caused the death of the said Thomas A. Jones could have been averted, had said derail been provided.

VIII.

Petitioner further shows that the death of her husband and
6 father of said children occurred wholly through the gross negligence and carelessness of defendant, its agents and employees, and that he was in no way at fault or to blame for the same.

IX.

Petitioner further shows that she and her children aforesaid have lost the care and comfort of a husband and father; that by his death they have been caused to suffer great physical pain, mental anguish and distress, for which they should recover the sum of Five Thousand Dollars.

X.

Petitioner further shows that her said husband was a robust, healthy man, earning Two Thousand Four Hundred Dollars per year, and that he would have continued to earn that amount for and during an expectancy of sixteen years; that the said children are, and were entitled to the support and maint*ai*nance of their father, and petitioner likewise that of her husband; for the loss of which they should recover the sum of Twenty Five Thousand Dollars.

Wherefore, petitioner prays that the Kansas City Southern Railway Company be served with a copy of this petition, and cited to appear and answer the same, according to law; that, after due proceedings had, she, as Administratrix, have and recover judgment in the sum of Thirty Thousand Dollars with legal interest thereon from date of judgment until paid.

She prays for costs and for all general and equitable relief.

BLANCHARD & SMITH,
OTIS W. BULLOCK,
Att'ys for Pl't'f.

STATE OF LOUISIANA,
Parish of Caddo:

Personally appeared before me the undersigned authority Mrs. Nora M. Jones Administratrix who, being duly sworn, deposes and

says that all the facts set forth and allegations made in the foregoing petition are true.

NORA M. JONES.

Sworn to and subscribed before me this 7th day of April,
7 A. D. 1913.

OTIS W. BULLOCK,
Notary Public.

Endorsed: Filed Ap'l 10, 1913. C. E. Peatross, D'y Clerk.

8 *Petition and Bond for Removal.*

District Court of the Parish of Caddo, State of Louisiana.

No. 16089.

Mrs. Nora Jones, Adm'x,
vs.
Kansas City Southern Ry. Co.

Know all men by these presents that we Kansas City Southern Ry. Company of the City of Kansas City in the State of Missouri as principal and J. D. Wilkinson as surety, are holden and stand firmly bound unto Mrs. Nora Jones, Adm'r in the penal sum of Five Hundred Dollars, for the payment whereof well and truly to be made unto the said Mrs. Nora Jones, Adm'r, heirs, representatives and assigns, we bind ourselves, our heirs and assigns jointly and firmly by these presents.

Upon the conditions nevertheless, that whereas the above bounden principal has filed its petition in the district court of Caddo parish, Louisiana, for the removal of a certain cause wherein the said Mrs. Nora Jones, Adm'x, is plaintiff and the said principal herein is defendant, to the district court of the United States in and for the western district of Louisiana.

Now if the said aforesaid principal in this bond shall enter into the said district court of the United States *in* the first day of its next session a copy of the record in said suit; and shall well and truly pay all cost that may be awarded by said district court of the United States, if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof we have hereunto signed our names this the 23rd day of April, 1913.

KANSAS CITY SOUTHERN RY. COMPANY,
By J. D. WILKINSON, *Att'y.*
J. D. WILKINSON.

J. D. Wilkinson makes oath and says that he resides within
9 the jurisdiction of said court, that he is a free holder therein and is worth the sum of five hundred dollars over and above all property exempt from sale on above execution.

J. D. WILKINSON.

Sworn to this 23 day of April, 1913.

——— ———.

10 *Petition for Removal.*

D. C., Caddo Parish, Louisiana.

No. 17089.

Mrs. NORA JONES, Adm'x,
vs.
KANSAS CITY SOUTHERN RY. CO.

Your petitioner the Kansas City Southern Railway Company a corporation duly organized under the laws of the State of Missouri, with its domicile at Kansas City, in said state, respectfully shows to this honorable court that it is the defendant in this suit, which is of a civil nature and that the matter and amount in dispute in this cause exceeds the sum or value of Three thousand dollars, exclusive of interest and cost; and

That the controversy herein is between citizens of different states; that plaintiff Mrs. Nora Jones Adm'x was at the time of the commencement of this suit and still is a citizen of the state of Louisiana, residing at Shreveport in said state, and that your petitioner, the Kansas City Southern Railway Company was at the time of the commencement of this suit and still is a citizen of the state of Missouri and of no other, residing at Kansas City in said state, being a corporation duly organized and existing under the laws of said state of Missouri and no other, and is not a resident of the state of Louisiana, and your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States to be held in and for the Western District of Louisiana.

And your petitioner offers herewith good and sufficient surety for its entering into the circuit court of the United States for the western district of Louisiana, on the first day of its next session a copy of the record in this suit, and for paying all cost that may be awarded by said circuit court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted; that this, said suit may be removed
11 into the circuit court of the United States to be held in the western district of the state of Louisiana, pursuant to the statutes of the United States in such cases made and provided and that no further proceedings may be had in this court and for general relief.

ALEXANDER & WILKINSON,
Attorneys for Petitioner.

District Court, Caddo Parish, Louisiana.

No. 17089.

Mrs. NORA JONES, Adm'x,
vs.
KANSAS CITY SOUTHERN RY. CO.

The defendant herein having within the time prescribed by law filed its petition for removal of this cause to the Circuit Court of the United States for the western district of Louisiana, and having at the same time offered good and sufficient bond conditioned according to law; therefore, the court does accept said bond and does order that this cause be removed for trial to the circuit court of the United States for the western district of Louisiana, next to be held, pursuant to the statutes of the United States and that all other proceedings in this court be stayed.

Done, read and signed in open court on this the 23rd day of April 1913.

Judge 1st Dist. Court of Louisiana.

Endorsed: Filed Apr. 23, 1913. R. B. Cook, Deputy Clerk.

12 *Defendant's Bill of Exception-.*

District Court, Caddo Parish, La.

No. 17089.

Mrs. NORA JONES, Administratrix,
vs.
KANSAS CITY SOUTHERN RY. CO.

In this case be it remembered that at and before the time an answer was due the defendant filed its petition and bond, asking for a removal of this cause to the District Court of the United States for the Western District of Louisiana, on the ground that the matter or amount in dispute exceed- Three Thousand Dollars and that it was a case between citizens of different states, as appears from said petition and bond now filed in the record of this cause. Counsel for the plaintiff objected to such removal on the ground that same arose under the Federal Employees' Liability Act and was therefore not removable to the Federal Court and this objection was sustained by the court and the said petition for removal was denied.

By the COURT:

Under the Act of Congress of April 5, 1910, amending the Federal Employee-' Liability Act of April 22 1908, State courts have con-

current jurisdiction with Federal Courts on actions arising under the Act and the amendatory act aforesaid distinctly declares that "No case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

See Simonds v. Ry. Co. 192 Fed. 353;
Younts v. Tel. Co., 192 Fed. 250;
Strauser v. Ry. Co. 193 Fed. 293;
Lee v. Ry. Co. 193 Fed. 685;
McChasing v. Ry. Co., 197 Fed. 85.

To which ruling of the court counsel for the defendant then and there excepted and reserved this bill of exceptions which was read, signed and filed in open court on April 30th 1913.

T. F. BELL, *Judge.*

Endorsed: Filed —— —, ——.

13 *Motion to Strike Out.*

District Court of the Parish of Caddo, State of Louisiana.

No. 17089.

Mrs. Nora M. Jones, Adm'x,
vs.
Kansas City Southern Ry. Co.

In this case now comes defendant and without waiving any of the exceptions or pleas herein fixed by it and without answering to the merits of plaintiff's demands, moves the court to strike out of plaintiff's petition article 4 for the reason that it is utterly irrelevant to any issue in the case and made for the only purpose of prejudicing the case of defendant before the jury; that its proof or disproof will not in any manner aid or retard the plaintiff's recovery in law and the said allegations can only be used for the illegal purpose of creating sympathy for the petitioner.

It further moves to strike from plaintiff'- petition article 9 on the ground and for the reason that no such damages as are alleged can be recovered in this action.

Wherefore defendant prays that this motion to strike out be sustained and that said articles be stricken from plaintiff's petition and for cost and general relief.

ALEXANDER & WILKINSON, *Attorneys.*

I hereby certify that the above motion is filed in good faith and not for mere purpose of delay.

J. D. WILKINSON,
Of Counsel.

Endorsed: Filed May 14, 1913. R. B. Cook, Deputy Clerk.

14 *Plaintiff's Bill of Exception-.*

First Judicial District Court, Caddo Parish, Louisiana.

No. 17089.

Mrs. NORA M. JONES, Administratrix,
v.
KANSAS CITY SOUTHERN RY. COMPANY.

Be it remembered that on the trial of the motion to strike out that part of Paragraph 4 of Plaintiff's petition which reads as follows:

"Petitioner shows that the said Thomas A. Jones met his death with great heroism, for after seeing the rapidly approaching cars, that foretold an inevitable collision, that he, mindful of the human lives he had in his keeping as locomotive engineer of defendant's passenger train, with death only a few seconds away, the said Thomas A. Jones, remained at his post and applied all the means at his command to stop his train, and that his prompt and heroic action saved the lives of those upon the train, at the cost, however, of his own life."

The motion was sustained and this part of the petition was ordered stricken out for the following reasons:

In the first place the above is not a complete copy of Paragraph 4 of plaintiff's petition.

That the question of whether Thomas A. Jones was a hero or whether he was mentioned for a national medal given for conspicuous acts of heroism is irrelevant to the only question in this case; the negligence vel non of the defendant company:

That it is not a necessary allegation, and its only effect would be to prejudice the jury in favor of plaintiff.

Whereupon the plaintiff, through her undersigned counsel, excepts to the ruling of the Court and reserves this, her bill of exceptions, and she prays that the same be signed and made a part of the record in this cause.

T. F. BELL, *Judge.*

Endorsed: Filed May 28, 1913. R. B. Cook, Deputy Clerk.

15 *Amended and Supplemental Petition.*

First Judicial District Court, Caddo Parish, Louisiana.

No. 17089.

MORA M. JONES, Administratrix,
v.
KANSAS CITY SOUTHERN RY. COMPANY.

Now into court comes your petitioner and reserving all of her rights under the pleas and exceptions heretofore filed, for amended and supplemental petition shows that Alice Jones is seven years old, that Majorie Jones is six years old, and that John Edward Jones is two years old: That these three said children are the issue of her marriage to said Thomas A. Jones, deceased. She declares that the said W. H. Jones and Orion Jones, issue of T. A. Jones' prior marriage are of age and as to these two children she asks that they be eliminated as parties to the suit, and that a non suit as to them be granted.

Petitioner for amended Paragraph 10 shows that the said children, Alice Jones, Majorie Jones and John Edward Jones were dependent upon their said father for support and that the said Alice Jones, Marjorie Jones and John Edward Jones are entitled to $15,000.00, $5,000.00 to Alice Jones, $5,000.00 to Majorie Jones and $5,000.00 to John Edward Jones for their support and maintenance until they be self supporting. That the said amount is necessary for their support and maint*ain*enance and education until such time.

And, further, that the said Mrs. Nora M. Jones, widow, was wholly dependent upon her said husband for her support and maintenance and that she should be awarded the sum of $15,000.00.

Wherefore, petitioner ratifies and affirms the allegations of her original petition, save as herein amended, and prays that this said amended petition be served upon the defendant according to law, and that after due proceedings had, she, as administratrix, do have and recover judgment in the sum of $30,000.00, with legal
16 interest thereon from date of judgment until paid, the said $30,000.00 being apportioned $15,000.00 to Mrs. Nora M. Jones, widow, $5,000.00 to Alice Jones, $5,000.00 to Marjorie Jones, and $5,000.00 to John Edward Jones, with legal interest thereon from date of judgment until paid.

She prays for all costs and for general and equitable relief.

O. W. BULLOCK,
BLANCHARD & SMITH,
Attorneys.

STATE OF LOUISIANA,
Parish of Caddo:

Personally appeared before me, the undersigned authority Mrs. Nora M. Jones, Administratrix, who, being duly sworn deposes and

says that all the facts set forth and allegations made in the foregoing petition are true.

NORA M. JONES.

Sworn to and subscribed me this 4th day of June A. D. 1913.

GEO. G. DIMICK,
Notary Public.

Service accepted & citation waived reserving all legal delays, June 4/13.

ALEXANDER & WILKINSON,
Att'ys for Def't.

Endorsed: Filed Jun- 4, 1913. R. B. Cook, Deputy Clerk.

17 *Answer.*

District Court, Caddo Parish, La.

17089.

Mrs. Nora M. Jones, Adm'r,
vs.
Kansas City Southern Ry. Co.

In this case now comes defendant and reserving the benefit of all exceptions and -leas heretofore filed by it and for answer to the demands of the plaintiff:

1. Admits this allegation, except as to the indebtedness alleged which it specially denies.
2. It admits this allegation.
3. It denies this allegation.
4. This allegation has been stricken out by order of the court.
5. It denies this allegation.
6. It denies this allegation.
7. It denies this allegation.
8. It denies this allegation.
9. This allegation was stricken out by order of the court.
10. It knows nothing of this allegation and has no opinion and belief thereon, but denies the same.

It denies the allegations of the amended and supplemental petition, and insofar as same may be applicable thereto makes its answer as above an answer to said amended petition.

Wherefore it prays that the demands of the plaintiff be rejected at her cost and for general relief.

ALEXANDER & WILKINSON,
Attorneys.

J. D. Wilkinson being by me duly sworn says that he is one of the attorneys for the defendant in the above suit and that all of its officers and agents are absent from the state and that all of the

facts set forth and allegations made in said answer are true to the best of his knowledge and belief and that he acquired his
18 information of the facts in regard thereto by written statements made by the witnesses thereof now in his possession.

J. D. WILKINSON.

Sworn to and subscribed before me this the 21st day of June 1913.

JOHN F. SLATTERY,
Notary Public.

Endorsed: Filed June 21, 1913. R. B. Cook, Deputy Clerk.

19 *Motion for New Trial.*

District Court of Caddo Parish, Louisiana.

No. 17089.

Mrs. Nora Jones, Adm'r'x,
vs.
K. C. S. Ry. Company.

In this case now comes defendant and shows unto the Court that the verdict of the jury herein is contrary to the law and the evidence and a new trial should be granted herein.

Wherefore it prays that a new trial be granted in said cause and for general relief.

ALEXANDER & WILKINSON,
Attorneys.

I hereby certify that the above motion is not filed for mere purpose of delay but is filed, in good faith, and in my opinion is good in law.

J. D. WILKINSON,
Of Counsel for Defendant.

Endorsed: Filed Jun- 28, 1913. R. B. Cook, Deputy Clerk.

20 *Judgment.*

First Judicial District Court, Caddo Parish, Louisiana.

No. 17089.

Nora M. Jones, Administratrix,
v.
Kansas City Southern Ry. Co.

By reason of the verdict of the jury and the law and the evidence being in favor thereof, it is ordered, adjudged and decreed that the

plaintiff, Mrs. Nora M. Jones, Administratrix, do have and recover judgment against the defendant, the Kansas City Southern Railway Company, in the full sum of Seventeen Thousand Five Hundred ($17,500.00) Dollars, with legal interest from date of this judgment, the said amount being for the benefit of and being apportioned as follows: Mrs. Nora M. Jones, widow, the sum of Five Thousand ($5,000.00) Dollars, John Edward Jones, minor child, Five Thousand ($5,000.00) Dollars, Marjorie Jones, minor child, Four Thousand ($4,000.00) Dollars, and Alice Jones, minor child, Three Thousand Five Hundred ($3,500.00) Dollars, together with legal interest upon said amounts from the date of this judgment and the defendant to pay all costs of this suit.

Done, read and signed in open Court, this June 30th, 1913.

T. F. BELL,
Judge First Judicial District Court of La.

Endorsed: Filed —— — ——.

20½ Deputy Clerks: A. S. Hardin, Chief Deputy; W. M. Levy, F. C. O'Leary.
Deputy Clerks: R. B. Cook, Court Stenographer; O. F. Simmons.

S. O. Williams,
Clerk First District Court,
Caddo Parish, La.

SHREVEPORT, LA., November 14th, 1914.

Hon. Paul E. Mortimer, Clerk Supreme Court, New Orleans, La.

DEAR SIR: In the case of Nora M. Jones, Admx., vs. The Kansas City Southern Railway Co. on appeal from this Parish, and on file in your Court under No. 20,144, there appears on page 29, "Exhibit A" of said record the phrase "End Rocked Out." This is a typographical error on the part of my stenographer, and same should read "End Knocked Out." Inasmuch as this case is set for argument before your honorable court on Monday, November 16th, and I fear the error may be misleading to Counsel and Court, I would respectfully ask that you hand the enclosed copies of this letter to counsel of record that they may have the correct fact before them in the presentation of their case to the Court.

Thanking you for your kind attention, I am,
Respectfully,
(Signed) A. S. HARDIN,
Chief D'y Clerk.

21 "A."

Draft Bolts & D'ft Timber Special. B.

Port
Arthur Route
11-4-1911
Repair Track
Bad Order
K. C. S. Ry. Co.

R
End [K]*nocked Out.

CRIM 350107.

Endorsed: Filed in Evidence in Suit. Number 17089. Date June 27, 1913. R. B. Cook, Deputy Clerk.

22 "B."

File 124.

SHOPS, Jan. 10, 1912.

Mr. R. D. Andrews, Foreman, Shops.

DEAR SIR: Referring to accident train #3, just south Cross Lake bridge, night of November 6th.

A reprimand has been placed against your record for responsibility and failure to *be* a brake on car that broke off, which would have placed you in a better position to take care of the situation, and possibly in position to have overcome this trouble.

Yours truly,

C. R. PARISH,
G. Y. M.

Endorsed: Filed in Evidence in Suit. Number 17089. Date June 27, 1913. Chas. F. Crane, Deputy Clerk.

23 "C."

File 133.

SHREVEPORT, LA., Nov. 8, 1911.

Mr. R. D. Andrews, Foreman; Mr. P. J. O'Niell, Switchman; Mr. A. P. Bakewell, Switchman, Shops.

GENTLEMEN: Mr. R. R. Sutherland, Trainmaster is calling for report from you covering accident to train No. 3 Nov. 6th. Pls.

[*Letter erased in copy.]

arrange to make report form 265 at once and mail same to me, giving full particulars in detain as to what move you were attempting to make. How many cars you were handling, and what action was taken to avoid the accident. Give location of each man on crew at time of accident. Must have full particulars. Don't fail to make this report at once.

Yours truly,

C. R. PARISH,
G. Y. M.

Endorsed: Filed in evidence in suit Number 17089. Date June 27, '13. Chas. F. Crane, Deputy Clerk.

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25 District Court, Caddo Parish, Louisiana.

No. 17089.

NORA M. JONES, Adm'r'x,
vs.
KANSAS CITY SOUTHERN RY. COMPANY.

Evidence Taken on the Trial of the Above-numbered and Entitled Cause, on Trial Before the Honorable T. F. Bell, Judge of Section "A," First Judicial District Court of Louisiana in and for Caddo Parish, and Twelve Good and Lawful Jurors, Who Were First Duly Sworn, Trial Commencing on June 27th, 1913; Evidence Reported by R. B. Cook, Stenographer.

Appearances:

Blanchard & Smith and O. W. Bullock, Attorneys for Plaintiff.
Alexander & Wilkinson, Attorneys for Defendant.

Plaintiff's Evidence.

Mrs. NORA M. JONES, witness for Plaintiff, being first duly sworn, testified as follows:—

On direct examination -he said:—

By Mr. Smith:

Q. Mrs. Jones, you were the wife of the late T. A. Jones?
A. Yes sir.

Q. Mr. Jones was killed in a railroad wreck?
A. Yes sir.
Q. How many dren have you?
A. Three.
Q. Will you state to the Jury their ages?
A. The youngest is two years old, the next six and the next seven years old.
Q. Give their n-
A. Edward Two years old, Margaret Six and Alice seven.
Q. They are the three children by your marriage with Mr. Jones?
A. Yes sir.
26 Q. Mr. Jones was engaged in what kind of work when he was killed?
A. Passenger engineer on the Kansas City Southern Railway.
Q. How long had he been running an engine on the Kansas City Southern Railway?
A. Fifteen years.
Q. Fifteen years?
A. Yes sir.
Q. The night when he was killed, where was he coming from with his train?
A. De Queen Arkansas to Shreveport.
Q. Coming down through Texarkana to Shreveport?
A. Yes sir.
Q. Who was the conductor?
A. Pat Owens.
Q. What was Mr. Jones' salary per month?
A. About one hundred and seventy five dollars per month, some months more than that.
Q. So when you say sometimes more, it was according to the number of hours that he put in?
A. Yes sir, over time.
Q. Averaged one hundred and seventy five dollars a month and over?
A. Yes sir.
Q. What age man was your husband?
A. He was fifty three years old when he was killed.
Q. He was fifty three years old when he was killed?
A. Yes sir.
Q. What other means of support had you besides Mr. Jones' work?
A. Not any.
Q. Was Mr. Jones killed instantly, or do you know?
A. Yes sir, instantly.
Q. Mrs. Jones, at the time of his death, what would you say about his health?
A. He had good health, he was never sick.
Q. Never sick?
27 A. No sir, healthy man.
Q. Was he physically a strong man or a weak man?
A. A strong man.
Q. Mrs. Jones, what would you say of him as a provider for his family?

A. He was a good provider for his family, always provided well for us.
Q. Devoted to his children and his home?
A. Yes sir.
Q. Where did he spend most of his leasure time, when in Shreveport?
A. At home.
Q. You have two girls and one boy?
A. Yes sir.
Q. Mrs. Jones, to live here in Shreveport and support your family in the manner in which you live- in Mr. Jones' time, about what would it take per month?
A. Takes One hundred dollars per month, sometimes a little over.
Q. That is living in the same manner you did in his time?
A. Yes sir.
Q. Can you live on that amount now?
A. Yes sir.
Q. Are the children at School?
A. The oldest one is.
Q. Have you the watch that Mr. Jones owned?
A. Yes sir, the one he had on him when he was killed.
Q. You have the watch now?
A. Yes sir.

(Witness produces watch.)

Q. Mrs. Jones, would you mind stating your age, because the quantity of damages is somewhat regulated on the number of years you have to make your way in life?
A. I am 'hirty five years old.
Q. Thirty five?
A. Yes sir.
Q. And the children of course all have to be raised and educated and clothed?
28 A. Yes sir.
Q. What would you say about the cost of living, is it decreasing or advancing?
A. Advancing considerable.
Q. Mrs. Jones, what would you say about your husband's habits, was he a sober man?
A. Yes sir.
Q. Was he industrious?
A. Yes sir.
Q. Worked regularly?
A. Yes sir, very seldom lay off.

On cross-examination -he said:—

By Mr. Wilkinson:

Q. Mrs. Jones, you were the second wife of Mr. Jones?
A. Yes sir.
Q. How long had you all been married?

A. He was killed the 6th of November and we would have been married twelve years Christmas day.
Q. He was on the run between Shreveport and De Queen Arkansas?
A. Yes sir.
Q. You say he was fifty three years old?
A. Yes sir.
Q. Mrs. Jones, are you engaged to be married now?

Objected to by Counsel for Plaintiff, as irrelevant.
Objection sustained by the Court.
To which ruling of the Court, Counsel for Defendant excepts and asks that this note stand in lieu of formal bill of exceptions.

ELMER WOODS, witness for Plaintiff, being first duly sworn, testified as follows:—

On direct examination he said:—

By Mr. Bullock:

29 Q. Mr. Woods, what business are you engaged in?
A. Fireman for the Kansas City Southern Railway Company.
Q. At the present time?
A. Yes sir.
Q. Where do you live?
A. I live in Shreveport the biggest part of the time, lay over longer here than at De Queen.
Q. What business were you engaged in in November 1911?
A. Fireman for the Kansas City Southern Railway Company.
Q. Do you recall a wreck in which T. A. Jones was killed in November 1911, just outside of the city limits of Shreveport?
A. I do.
Q. What connection did you have with the train that Jones was in charge of then?
A. I was fireman.
Q. On the engine with Mr. Jones?
A. Yes sir.
Q. Now explain to the Court and Jury just how this accident occurred Mr. Woods?
A. We were coming in here on Number three, South bound passenger train due at the shops at Ten fifty and we passed Sheehan, the last station and we always hurry up to get in so as to get out on time, and just as we came across the lake bridge not over three or four car lengths from the bridge Mr. Jones shut off the engine. We were in the habit of finding someone hung up on the hill, nearly every trip or two, and they would flag us and we would stop, and that is what I thought they had done that night. I set the fire in the engine and got where I thought I could see up the straight track, we were on a curve to the right, and I stuck my head out the window to see how far up it was. I looked out just in time to see the switchman jump off. I did not wait to see any more, I made a jump and lit behind Jones in the gangway and the next time I hit the ground

and they hit, had not run a car past me when they hit, lying
30 where I was, they were coming down the hill with a lumber box car.

Q. What was that car loaded with?

A. Two by ten dressed pine I think, it had gotten loose somewhere in the yards and come down the hill. There is a pretty good grade from the shops down to Cross Lake.

By Juror:

Q. Was there a brakeman in charge of the car?

A. Yes sir, a switchman rode the car down there, I suppose he had nothing to stop it with, no man would ride down there if he could stop it, if it was in his power to stop it.

Q. What condition was the lumber on the car, was the car heavily loaded or not?

A. I did not pay much attention. They usually load them to the limit, pretty good pile of it.

Q. What damage was done to the engine pulling the train that you were firing?

A. The front end of the engine was broken in, about everything was knocked off of it that could be knocked loose, the lumber split and half went on each side.

Q. What happened to Mr. Jones?

A. It threw Mr. Jones on the cab, he was on the back end of the tender when I found him.

Q. Was he alive?

A. Dead, just gasping.

Q. He stuck with it?

A. Yes sir

Q. Did he speak after that?

A. No, sir.

Q. When you jumped, what did Jones do?

A. Well I did not hardly take time to see what he done, he made a service application, *when* commenced to flag, made the service application like we make at an ordinary station stop, and he supposed he had plenty of room to stop in.

Q. What efforts do you know that Mr. Jones made to stop that passenger train?

31 A. He made all efforts possible, put it into the emergency, just as I was going across the gang way, he saw the car about the same time I did.

Q. Was the engine reversed?

A. It was reversed when they got back on it.

Q. The emergency brakes were applied?

A. Yes sir.

Q. And the engine reversed?

A. Yes sir.

Q. What was the condition of this load of lumber after the wreck?

A. Well, I did not look to see how it was left, but I am sure there was a good pile of it on each side of the train, piled several

feet high, where I stopped I put out my hand and it was on it, when I got up, me and the lumber struck about the same time.

Q. How far from the Company's yards did this wreck occur?

A. I believe it is inside of the yard limit—I believe the yard limit board is at Cross Lake, but it seems to me the board was this side of where we struck at at that time, half way up the hill.

Q. Mr. Woods, are you familiar with the tracks of the Kansas City Southern tracks over these yards?

A. Tolerable, been working on it for about eight years.

Q. Explain the condition of the yards and the repair tracks and main line, with reference to their location?

A. Well the yards where they do the switching, where they make up and store cars and make up all the trains is on the right hand side coming in?

Q. North or South side of the line?

A. West side I believe there?

Q. West and South?

A. Yes sir. South West the line is nearly North and South there I think and the rip tracks are on the East side, the way I call it. The rip track branches off just *just* South of the Viaduct.

32 Q. The Yard is on the South or West side of the main line?

A. Yes sir.

Q. And the repair track is on the East side, or North side?

A. Yes sir.

Q. This incoming passenger train of the Kansas City Southern would arrive on what track?

A. They would come up over the main line, the high line, the yard- are cut down eight or ten feet, and the main line the one the passenger trains use is up on top of the bank.

Q. As I understand the main line, on which the passenger trains arrive is elevated eight or ten feet above the tracks of the yards?

A. Yes sir, that is the switch yards.

Q. What is the condition of the repair track, with reference to the main track, as to *belive* level with it or not?

A. It is just about on a level with the main line, some of the tracks are a little lower, but you might say they are about level with the main line.

Q. About how far did this wreck occur, from the beginning of the yard track?

A. Right at a mile and a half.

Q. Where does the repair track leave the main line, as compared to the yard tracks?

A. The repair track, there are two *siwtches* that are—there are two switches that come down into the yard, one just South of the Viaduct, two or three hundred feet, near the half mile, and the rip track, where they do the repairing is South of the Viaduct about two or three hundred feet.

Q. What is the condition of the main line, with reference to being an incline or level?

A. It is level right as you leave the shops till you get within two

or three or probably four hundred feet of the viaduct, then there is a dip under the viaduct then a little rise from the Viaduct and then from that down the hill to the lake I do not know what
33 per cent the grade is, steep enough for a car to roll down, however.

Q. Now this wreck occurred on an incline, or was it on the level track?

A. Just about the lower end of the incline.

Q. You were just passing off the Cross Lake Bridge?

A. We were about four or five or six telegraph poles South of the bridge. I never paid any attention to what the distance was, but it was something like that.

Q. Now cars in bad order are placed on what part of the Company tracks, which tracks?

A. They usually, when in bad order put them on the rip track, there is where they repair them on the East side, they are always placed there in the beginning or sometime—sometimes they are set out in the yard first, until they bunch them and then take them down there.

Q. Do you know where this particular car was located just prior to the time it was released from the Company's engine?

A. No sir, only from what others told me.

By Mr. Smith:

Q. Your train was coming in, and it was curving to the South?

A. Yes sir.

Q. It was coming South, from the North to Shreveport?

A. Yes sir.

Q. On what side of that engine cab was Mr. Jones?

A. On the right hand side.

Q. On the right hand side?

A. Yes sir.

Q. Then you were on the left?

A. Yes sir.

Q. Now when the car of lumber showed up in front of the engine who saw it first, from the shape the light was in?

A. I believe I saw it probably an instant, not long enough to tell.

Q. The engine was coming around a curve would throw the light straight, and it would not be right up the track?

A. No, sir.

Q. Did you see the whole car or one end of it?

34 A. Only glanced at the corner of it.

Q. What did you see?

A. The first thing I saw when I stuck my head out, was the switchman just as he jumped.

Q. When he jumped?

A. Yes sir.

Q. Was this a dark night?

A. Pretty dark.

Q. What time of the night was it?

A. Ten forty two, that is the time we put on the book.
Q. Were you coming through a cut?
A. There was a cut there but I think was too wide, it did not obstruct my observation. Where I lit there was a little cut, of probably two feet deep.
Q. Your engine was just about to come up hill?
A. Yes sir, started on the incline.
Q. When you saw this brakeman jump, what suggested itself to you then?
A. The next thing I thought was to jump myself. I knew we were into something.
Q. You crossed over by Mr. Jones?
A. Yes sir, in whirling around and jumping I lit in the gang way and then on the ground.
Q. Before you left that engine, what did Jones do?
A. He was applying the brakes, that is had applied the brakes and just as I jumped he put them into the emergency.
Q. You could feel that?
A. Yes sir.
Q. Did Mr. Jones try to save himself?
A. Not that I saw, he tried to stop.
Q. What was the condition of the brakes, were they into the emergency?
A. Yes sir.
Q. Was the air applied every way?
A. Yes sir.
35 Q. Was there anything more he could have done to stop the train?
A. No sir, the engine was reversed.
Q. Could anything more have been done to have stopped that train than was done?
A. That was all there was that could possibly be done.
Q. After you jumped, how long was it before the train hit?
A. I do not suppose they were thirty feet apart, they hit within ten seconds after I hit the ground, something like that.
Q. When you all passed the last station or stop, with your passenger train, was your train on time?
A. We were out of Shehan on time.
Q. When you got to Shehan were you on time?
A. Yes sir. We had been late that night.
Q. But when you got to Shehan you all were on time?
A. Yes sir.
Q. Now after leaving Shehan, were you all running at any extra rate of speed?
A. No, sir, just about the usual rate of speed, the tracks across Cross Lake were not good.
Q. What orders did you all have on that?
A. We had slow orders on places, either one or two telegraph poles North of the bridge, we slowed down to eighteen or twenty miles an hour over that.

Q. What about Mr. Jones as an engineer, was he a safe engineer or one that would take chances?

A. He was considered as safe a man as there was *in* the road and as far as I was concerned myself I always felt perfectly safe with him.

Q. If it had been thirty seconds later, where would this collision have occurred?

A. Well it would be hard to tell how far that car would have gone in thirty seconds, but it would have been about that bridge.

Q. You stated that you heard Jones answer a signal?

A. Yes sir.

36 Q. You said that you thought possibly someone might be tied up you mean a train?

A. I mean that we very often find a train tied up, in pulling into the yard the engine would not be able to handle it and they would often cut off part of the train and come back and get the balance, or wait for the switch engine, and would send out a flagman and flag us, and we would stay there until the train got out of the way.

Q. If this car had been stationed where they generally found trains and a signal had been given, would he have had ample time to have stopped?

A. Yes sir.

Q. How many times could he have stopped.

A. From where they usually hung up, we could have stopped twice I suppose, had plenty of room to stop.

Q. Nothing unusual to get a signal of that kind to stop?

A. No, sir, expect something like that usually around there and always looking for it.

Q. You could not see up the track very far, on account of the curve?

A. Yes sir, see quite a distance up there, it was cut out and I think the leaves were off.

Q. A train coming around a curve, the light don't show up the track?

A. No, sir, could not see anything except inside the light.

Q. Is there any derail on this main track?

A. No, sir.

Q. You are familiar with the V. S. & P. railroad here?

A. No, sir, I am not.

Q. You know that it is down grade from the Union Depot down to the bridge?

A. Yes sir.

Q. Did you ever walk down that track and notice whether there is a derail there at the Union Station?

A. I do not believe that I ever walked down the V. S. & P. track.

37 Q. You know that it is down grade from the Union Depot down to the bridge?

A. Yes sir.

Q. And if a car got loose on that hill it would be most likely to go to Bossier City?

A. Yes sir.

Q. You say that this car was moving pretty rapidly?
A. I judge it was coming down there something like forty miles an hour. A fellow has not got time to judge the speed, in as quick an observation as I had.
Q. If that car of lumber was released at the top of the hill, about how long would it have taken to get down where it struck you?
A. It would come down there in two and a half or three minutes probably, probably a little sooner than that.
Q. Be according to the start it got on top of the hill?
A. Yes sir.
Q. So that the Jury will understand what a derail is, just tell them what a derail is used for on an incline.
A. A derail is used on an incline, in case a car gets loose it will derail it, put it on the ground. They use it in lots of places to avoid accidents, as the cars will not go very far on the ground.
Q. They had no derail on these tracks?
A. No, sir, none on the main line, one on the rip track.
Q. Your train, your passenger train coming into Shreveport, what would you say about its right of way, did you have precedent over other trains?
A. Yes sir.
Q. You were supposed to be on the look out for obstructions on the track?
A. We are always on the look out.
Q. What is the rules of the Company with passenger trains?
A. We have a rule for first class trains to have the right of way.
Q. Of course you all keep a look out?
38 A. Yes sir.
Q. Who was the brakeman that was in charge of the run away car that jumped?
A. The switchman was O'Neal I believe that was his name.
Q. Who was the conductor in charge of your train?
A. Pat Owens.
Q. He has been in the railroad business sometime?
A. Yes sir.
Q. And is trusted?
A. Yes sir.

On cross-examination he said:

By Mr. Wilkinson:

Q. Mr. Woods, did you all have orders there to have the train under control coming up this place?
A. No, sir.
Q. Did not the engineer have orders in his pocket to have the engine under control in coming up to this point?
A. No, sir.
Q. Didn't you all expect to find a train, the local hung up on that hill?
A. We nearly always expected something like that, and I do not

know whether I am right or not, but it seems he had a message to look out for them.

Q. Didn't he have that then?

A. I am not positive whether he did or not, we nearly always have a message to that effect, get them very often.

Q. How far was this car coming down towards you, when you saw it?

A. We were probably one hundred feet from it.

Q. One hundred feet?

A. Yes sir.

Q. Was it on your side, you said you saw it on a curve, was that curve on your side or the engineer's side?

A. Engineer's side.

Q. Could you have seen the car first or could he have seen it first?

39 A. In day light he could have seen it first, being dark I think I could see it before he did, as the head light come around against it.

Q. About what speed were you all running at that time?

A. Between forty and forty five miles an hour.

Q. Running between forty and forty five miles an hour?

A. Yes sir.

Q. You did not have the train under control then?

Counsel for plaintiff objects to an- evidence as to contributory negligence as same is not alleged.

Objection sustained by the Court.

To which ruling of the Court Counsel for Defendant excepts and asks that this note stand in lieu of formal bill of exceptions?

Counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered.

Q. Mr. Woods, talking about the derail—this was on the main line where the accident happened?

A. Yes sir.

Q. Is it usual to have derails on the main line?

A. Yes sir, in places. Are you familiar with the yards at Mena Arkansas, we work out of Mena and they have a derail there on the main line.

Q. Suppose they had a derail on the main line, about where this wild car was, how could it have been used?

A. Well a derail is supposed to be open at all times, except while in use.

Q. But what I was trying to get at, it is not like a switch you have to turn it, throw it off and on?

A. No, sir, it will throw a car off, and you have to line it up with the track to use the track.

Q. You have to set it to use it?

A. Yes sir.

Q. Now if you had a derail on the main line you would always have to get down and open it for use?

40 A. Yes sir, and it would be open to catch anything that got loose and started down there, except when it was thrown, and you would go through and have to stop the train and line it up.

Q. Unless you did that it would throw your train off?

A. Yes sir.

Q. Then after the train passed you would have to set it again?

A. Yes sir, open it up.

Q. Unless it was set again a car come along it would not throw it off?

A. No, sir. The derail is to throw a car off.

Q. Probably kill the switchman?

A. Probably would not be going fast enough to hurt him, if derailed up close to where the car started.

Q. You had gone up to De Queen that morning?

A. No, sir, on two nights before.

Q. That was your regular run between here and De Queen?

A. Yes sir.

On redirect examination he said:

By Mr. Smith:

Q. Most likely a switchman would know of a derail, know where it was located?

A. Yes sir.

Q. And if he saw the car was going into it he would jump?

A. Yes sir, probably or it might not have gotten to going fast enough to damage anything.

Q. You said something about Mena, is that on the defendant's road?

A. Yes sir.

Q. On the Kansas City Southern Railway?

A. Yes sir.

Q. You do not necessarily have to get off of the train, could constantly have a switchman there to handle it?

A. It could be done, but it was not done up there.

Q. All your switches that you have to use, you have to line them up?

A. Yes sir.

Q. Then there is something to show whether they are lined up or open?

41 A. Yes sir.

Mr. Bullock:

Q. About what amount of switching is done in the Kansas City Southern yards, near where this wreck occurred?

A. Well they don't do any to amount to anything, there was a little switch near the wreck, but in the yards the switch engine works all the time.

Q. About what amount of switching is done in the yards?

A. I have no idea about that, there is one or two switch engines

and they are all kept pretty busy, they don't get to play any I don't think.

By Mr. Smith:

Q. Mr. Woods, what is about from the viaduct or overhead bridge to the place where the accident occurred?

A. Right at a mile and a half, between a mile and a quarter and a mile and a half.

Q. About where the wreck occurred, is there any *siwtch* there, or was that on the main line?

A. On the main line.

Q. There was no sowitch down that far?

A. There was a switch behind the train at what I think they call Gas Center.

Q. That has just recently been put there?

A. I do not remember whether it was in there at the time or not?

Q. It was put there recently?

A. Yes sir, has not been there very long.

Q. You do not know whether it was put there before or after that?

A. No, sir, I do not. I don't believe that it was in there at the time—I believe it was there too.

Q. When you saw that switchman on the rear end of that car, what kind of a light did he have, red or white light?

A. White light was all I saw.

Q. What is the danger signal in railroading?

A. Red Light.

Q. You know the rules about using the main track for
42 switching about time as passenger train is due?

A. Well I know them tolerably well.

Q. What are the rules of the defendant Company about using the main line for switching purposes at the time a passenger train is expected?

A. They are supposed to be in the clear of the main line, when a passenger train is due or about due, some places five minutes and some places must be in the clear ten minutes.

Q. No railroad requires less than five minutes?

A. No, sir.

Q. What are the rules of the Kansas City Southern at this particular place in the yards?

A. I do not know whether I can tell you or not.

Q. They allow some variation for watches?

A. Thirty two seconds every two weeks.

Q. How much time must they be off the main track when expecting a passenger train?

A. They are supposed to be in the clear?

A. How many minutes must they be off the main line?

A. Should clear passenger trains, not less than five minutes.

Q. Do you know what the rules are on that?

A. Five or ten minutes, I do not remember, been a good while since I looked it up.

Q. The Company issues a book of rules?
A. Yes sir.
Q. They can show it by the book of rules?
A. Yes sir, I have not looked it up in the book in some time, and I have got kind of rusty on it.

Counsel for Plaintiff wishes to call P. J. Oneal, to the stand for the purpose of cross examination under the acts of 1908.

Objected to by Counsel for Defendant on the Ground that he don't represent the defendant, and he is not the defendant and the law don't contemplate the calling of an employee for the purpose of cross examination.

43 Objection sustained by the Court.

To which ruling of the Court, Counsel for Plaintiff excepts and asks that this note stand in lieu of formal bill of exceptions.

P. J. ONEAL, witness for Plaintiff being first duly sworn, testified as follows:

On direct examination he said:

By Mr. Smith:

Q. What is your business now?
A. Switchman.
Q. For what railroad?
A. The Kansas City Southern Railway.
Q. Were you such for them at the time that Mr. T. A. Jones was killed?
A. Yes sir, on the 6th day of November.
Q. Have you been continuously in their employee since then?
A. No sir, out of their employ for three months.
Q. Right after the accident?
A. No, sir, last year in July.
Q. Were you the switchman in charge of the work of moving the car of lumber that got loose and ran into the passenger train?
A. No, sir, I was one of the helpers.
Q. Were you on the car that ran into the train that killed Mr. Jones?
A. Yes sir.
Q. When did you leave the car, that ran into the passenger train?
A. I should judge about three hundred feet, as near as I could judge, from the passenger train.
Q. You saw it three hundred feet?
A. Yes sir.
Q. You don't know exactly?
A. No, sir, that is just from my judgment.
Q. When you say three hundred feet, that was from what?
A. That is from where I got off the car to the train.
Q. That was a car loaded with lumber?
A. Yes sir.
Q. It was going at a pretty good speed, going down that Hill?

44 A. Well it had slowed up about then, about struck the level grade.

Q. Do you mean that a car heavily loaded with lumber will slow up?

A. Yes sir, struck the level grade then.

Q. With the momentum acquired in coming down that hill, would it not go at a pretty lively rate?

A. About fifteen miles an hour.

Q. Had you any way of telling how fast it was going?

A. No, sir.

Q. What caused you to jump?

A. I stayed with the car as long as I thought it safe to stay with it, so as to give everyone a chance.

Q. And when three hundred feet away you jumped?

A. Yes sir.

Q. Now didn't you jump prematurely?

A. No, sir.

Q. Why didn't you stay on there and attempt to stop the car?

A. I was not ready to die.

Q. You think if you had stayed any longer you would have died?

A. Pretty certain of it.

Q. You did not let that car get away just on purpose?

A. No, sir.

Q. You could not stop it?

A. No, sir.

Q. It was then out of order?

A. Yes, sir, from all appearances.

Q. It had a bad order tag on it, repair track?

A. Yes sir, transfer order.

Q. I will ask you if this tag was not on that car at the time. (Showing witness tag.)

A. I could not say.

Q. I will ask you if this one, or one similar to it was not on that car?

A. Yes sir, they have those cards.

Q. You say there was a bad order tag, red tag was nailed on it?

45 A. Yes sir.

(Counsel shows same to Jury.)

Q. Do you know the number of that car?

A. Yes sir.

Q. What name?

(Witness examines book.)

A. Chicago, Rock Island, No. 350,107.

Q. Mr. Oneal this car is marked "C." R. I. *M.* N. *W.*

Q. Chicago, Rock Island and New Mexico, they *have* those cars years ago in different districts.

Q. The same number that you gave?

A. Yes sir.

Counsel for Plaintiff offered the card or tag referred to in Evidence. "A." Filed in Evidence and marked exhibit "A."

Q. Mr. Oneal what was the matter with this car?
A. The brakes would not apply.
Q. Brakes would not apply?
A. No, sir.
Q. What was the condition of the end of the car, was it not knocked out?
A. No, sir.
Q. You are sure of that?
A. Yes sir, I am sure of that.
Q. Mr. Oneal, what is meant by the reading of that tag, read it to the Jury and explain what that means.
A. 'Draft bolts and draft timbers.'
Q. That is all?
A. As far as I can make it out.
Q. What is that at the lower corner to the left?
A. Something about end, says end knocked out.
Q. Mr. Oneal, they make mention on these tags what the specific defect is?
A. Yes sir, as a rule.
46 Q. This followed the usual custom?
A. Yes sir.
Q. The end might have been knocked out and you not noticed it? So that when you tell us you are not certain of that, you really did not know at the time?
A. No, sir.
Q. Just tell this Jury what you were doing with this car at the time it got away.
Q. I was the field man, working under Andrews foreman and we set out I believe four empty cars that were to be put on the transfer track for transfer of bad order cars and we then got hold of this Rock Island car, came out on the main line set that against the four empty cars, and there is what we call high line by letting the brakes off the cars and running the engine past the cars and drop out so as to get on the other end and expected to get in the clear about 10:35. We had three brakes set, two on the empties and the Rock Island, which I supposed had a good brake, and when we got the engine in the clear, Andrews says let them go and I started to let the brakes off. first let them off of the Rock Island car then to the second and let them off and the cars started and I went to the third and let that off and we passed the point of the switch and Andrews got on the head end and the man was at the switch so as to let the engine out and come on down the main line to get these cars. After we went through the sag, under the Viaduct the Rock Island car separated from the empties.
Q. The Rock Island car was the car on the North end?
A. Yes sir, and I hollered to Andrews, I says Dick the cars have separated, he says get down and try to check it up. We had then about five or six hundred feet from there to the old street car cross-

ing and I ran along on the ground and caught this car, expecting to stop it. I got on there then and it was going down about a two per cent grade and the brakes did not seem to apply. The fire seemed to fly from the wheels. I looked over the side. The engine then tried to catch this car, and Andrews got down and tried
47 to make a coupling. I hollered the brakes were poor. He got within four feet of it once or twice, but the car was going faster than the engine could go. I think the car must have been going forty five or fifty miles an hour, and they followed us down and seen they could not catch us and they blew the whistle. I stayed with the car. I understood that number three was then about due out of Shehan and we had four or five minutes.

Q. You are not certain about that?

A. No, sir.

Q. You were, with that car, about as busy as a man could be?

A. I tried the brakes two or three times.

Q. You did not have time to look at your watch?

A. Yes sir, I did.

Q. As a matter of fact you do not know whether the incoming passenger train had passed Shehan at that time?

A. No sir, I could see the head light when I was half way down the hill.

Q. You were helpless to do anything?

A. Yes, sir, I could not do anything, then I looked at my watch a second time and I thought the best thing I could do would be to stay with the car and give the people on the passenger train a chance for their lives.

Q. Was that a dark night?

A. Yes sir, I believe so.

Q. That train you say was going forty five miles an hour?

A. Yes sir, the car was at one time but it had slowed down when it hit.

Q. How did you see your watch at that time?

A. I had a light, all I have to do is to pull my watch out.

Q. You saw the head light of the passenger train ahead?

A. Yes sir.

Q. You were cool enough to figure about what time they would come together?

A. Yes sir.

48 Q. Now when your car was going down, as I understand you, did the engine attempt to catch the car?

A. Yes sir, done everything they could.

Q. When they would bump into it, it would not fasten?

A. Never got close enough to bump into it.

Q. The engine with the throttle wide open?

A. Yes sir.

Q. That must have been an awful mad run?

A. Yes sir.

Q. Could not get within four feet of it?

A. Yes sir.

Q. When did the engine abandon the chase?

A. About half a mile from where we hit, they stopped, they did not want to come on down and be in the wreck, they blew the whistle.

Q. What are your orders for clearing the main line, how long?

A. Ten minutes.

Q. Ten minutes?

A. Yes sir.

Q. Is it not five minutes?

A. Yes sir, line up the main track.

Q. Who gave the orders to go and release the brakes?

A. Mr. Andrews.

Q. Then these cars started of their own accord?

A. Yes sir.

Q. Must have been down grade?

A. Yes sir, a two and a half per cent grade.

Q. What was it you all expected to do with those cars?

A. After they stopped we were to back up with the engine and get hold of them and put them on the transfer track.

Q. After you released them, the front car you stated—what was the trouble?

A. Broke loose.

Q. You say Mr. Andrews ordered you to release the cars?

A. Yes sir.

Q. Who was he?

49 A. Engine foreman.

Q. Foreman for the Company?

A. Yes sir, foreman of the switching crew.

Q. At that time?

A. Yes sir.

Q. In charge of the switching that night?

A. Yes sir, of that crew.

Q. He was in charge of the switch engine that was handling this particular car?

A. Yes sir.

Q. He ordered you to release that car?

A. Yes sir.

Q. You took those cars off of the yards?

A. Took it out, of the rip track.

Q. Where is the rip track, or repair track?

A. At that time it was at the North end of the yard, a temporary yard, while moving the shed.

Q. When you picked these cars up on the repair track, what then did you do with them?

A. Set them on the main line.

Q. Put them on the main line?

A. Yes sir.

Q. Then what did you all do?

A. Cut the engine off passed on the side track, then let the brakes off so as to run the cars pass the switch.

Q. I will ask you to examine this document and state who wrote it? (Handing witness document.)

A. I expect that was written by Mr. Parish.
Q. You know his signature?
A. Yes sir.
Q. You received such a communications as that?
A. I do not know. It is addressed to me, a copy must have been sent to me.
Q. Who is Mr. Pasrish?
50 A. General Yard Master.
Q. Was he in the service of the Company at that time?
A. Yes sir.
Q. You say that is his signature?
A. I do not know, it might be his clerk's, I could not say.
Q. You do not know, Mr. Parish'- signature?
A. No, sir, the Clerk sometimes writes like he does.
Q. Examine this document and state if it was written by the same party who wrote the one just handed to you a minute ago. (Handing witness document.)
A. I could not state whether that was or not.
Q. Compare them and see if the same party wrote both of them?
A. I should judge it was the same hand writing.
Q. Mr. Oneal, you are not in a position to state positively that you received a copy of this communication?
A. I could not say now.
Q. You do not recall receiving anything of this kind?
A. No, sir, because these reports are usually made out, I think they were made out the next morning, before that communication came in. I remember that I made up the 265 the next morning. I don't think it was necessary to send that communication because I think we made it up. It is the rules of the Company to make out the 265 when an accident happens.

By Mr. Smith:

Q. Mr. Oneal, when you got off of this train, how did you get off, climb down?
A. I was down on the end ladder.
Q. Front end of the car?
A. Yes sir.
Q. Now when you jumped, do you recall whether that searchlight was bearing on you?
A. Pretty close.
Q. Well now Mr. Oneal, the light of course would point straight?
A. Yes sir.
Q. Then could you possibly have been three hundred feet
51 away under such circumstances?
A. Yes sir, the light would shine on me.
Q. Would it not have had to be closer than that, being on the curve for the light to shine on you?
A. I do not know.
Q. You cannot fix those distances?
A. No, sir, I cannot, I might have been closer.
Q. You jumped when that light was on you?

A. Yes sir.
Q. You got hurt?
A. A little, not very much.
Q. Mr. Oneal, state whether or not there is any derail on the main line from the shops down the way the car ran?
A. No, sir.
Q. You know of course what a derail is?
A. Yes sir.
Q. You know they have them here on the V. S. & P.?
A. No, sir, I am not acquainted with the V. S. & P.
Q. You know there is a derail out of Mena?
A. No, sir, I have never been there.

On cross-examination he said:

By Mr. Wilkinson:

Q. Mr. Oneal, when you attempted to release the brake on this wild car, when you turned loose the brake, it worked al- right?
A. Apparently so.
Q. It was set al- right?
A. Appeared that way.
Q. This bad order on the car did that have reference to the brakes?
A. No, sir.
Q. It was yet loaded with lumber?
A. Yes sir.
Q. You say that when it commenced going down the hill and you attempted to apply the brakes, you say the sparks of fire come from the wheels?
A. Yes sir.
52 Q. What did that come from?
A. It seemed to me the brakes were not in their proper place.
Q. Was not that because of the car being loaded heavy?
A. Yes sir.
Q. A heavy loaded car would throw them out of alignment?
A. Yes, sir, the brakes are regulated by the load of the car, a heavy load makes the brakes close to the wheel.
Q. Mr. Oneal, this car come uncoupled from the other cars?
A. Yes sir.
Q. Was there anything the matter with its coupling?
A. No, sir.
Q. Is it an uncommon thing for a train to be running along and the cars to become uncoupled, without any defect?
A. Yes sir.
Q. The fact that they come uncoupled does not indicate any defect in the coupling?
A. No, sir.

On redirect examination he said:

By Mr. Smith:

Q. Mr. Oneal, the railroad Company superintends the loading of the cars, they will not let them be overloaded?
A. No, sir, they do not.
Q. It is their duty to see they are not overloaded?
A. Yes sir.
Q. If they are overloaded, whose fault is it?
A. I suppose it is the fault of the man that loads it.
Q. A close inspection might have found out about the defect in the brakes, was not that true?
A. Well that is a question.
Q. Do you know the destination of the car?
A. I think it was for Kansas City, that was the end of our line. I do not know where it went from there.
Q. Do you know where it was shipped from?
A. No, sir, but it came from the South somewhere.
Q. Do you know when it was set out in the yards?
53 A. No, sir.
Q. You do not know how long it had been there before it was picked up?
A. No, sir.
Q. You know when this car was picked up, it had a bad order tag on it?
A. Yes sir, knew it was to be transferred.
Q. Bad order, had to be transferred, indicated it was in bad order?
A. Yes sir, sometimes they are overloaded, and sometimes they have to take out the lumber to repair them, have to transfer the lumber.
Q. Are you in a position to state that the engine never reached this wild car?
A. No, sir, it did not.
Q. You know that to be a fact?
A. Yes sir.

E. M. Carlton, witness for plaintiff, being first duly sworn, testified as follows:

On direct examination he said:
Counsel for Plaintiff calls this witness for purpose of cross-examination.
Objected to by Counsel for Defendant, same ruling of Court as with the former witness and bill of exceptions reserved.

By Mr. Smith:

Q. Mr. Carlton, what is your business now?
A. Switch engineer.
Q. For what road?
A. Kansas City Southern Railway Company.
Q. How long have you been an engineer for that road?
A. About five years.

Q. About five years?
A. Yes sir.
Q. Were you in the employ of the Kansas City Southern Railway Company on the 6th day of November, 1911, when Mr. T. A. Jones was killed?
54 A. Yes sir.
Q. What were you doing, the night that he was killed?
A. I was running the switch engine.
Q. Running the switch engine?
A. Yes sir.
Q. You know anything about the car that got loose?
A. Well I cannot say I know so very much about the car, I did not examine the car before the accident.
Q. You were in the engine and given signals to carry out certain orders?
A. Yes sir.
Q. Were you acting under orders at the time?
A. Yes sir, working under signals.
Q. Who ordered you all out in the yard, and the work to be done?
A. I am under the yard master.
Q. Who was the yard master?
A. Mr. Clayton.
Q. Are you certain whether it was Clayton or C. R. Parish?
A. C. R. Parish general yard master.
Q. Who were you under?
A. Mr. Clayton.
Q. Mr. Clayton had charge of it at night, night yard master?
A. Yes sir.
Q. Night yard master?
A. Yes sir, he was at that time.
Q. What were you doing that night when you got—when the car got away?
A. We were letting some cars roll by us.
Q. Where was you with your engine?
A. I was standing on the rip track lead, in the clear.
Q. The repair track?
A. Yes sir.
Q. These cars that were passing by, had they been taken out of the repair track?
A. One had.
55 Q. The front car?
A. Yes sir.
Q. Well what caused these cars to move?
A. Let the brakes off and take out the check.
Q. What was the first thing you knew that the car had gotten away, when did you first find that out?
A. After coupling on to the cars, after they rolled by us.
Q. After coupling on to them?
A. Yes sir, after coupling the engine on to the cars.
Q. You come out from the repair switch, on to the main line and connected up with five or six cars?

A. Yes sir, five cars.
Q. So then you bumped into them?
A. Coupled to them.
Q. Then when did you disconnect?
A. When we got back to the Round House.
Q. Well, when this car got away, did you take after it with the five cars?
A. Yes sir, four cars and the engine.
Q. Was this car in front of the engine, the one that got away, the Rock Island?
A. I don't remember the Rock Island car.
Q. The run away car was ahead of the engine?
A. No, sir, North of us.
Q. It was going down the track and you were following it?
A. Yes sir.
Q. Well did you speed up your engine to catch it?
A. Yes sir.
Q. Were you ever able to connect with it, when you reached it?
A. Tried to.
Q. What was the reason the engine did not make the coupling?
A. Could not catch the car, the car got the start on us.
Q. Why didn't you speed up?
A. I pulled her wide open.
Q. Could not catch it?
56 A. No, sir.
Q. When did you abandon the chase?
A. When probably three—when Number Three's head light showed up coming across the bridge.
Q. You slowed down then?
A. I stopped.
Q. What did you do then?
A. I whistled the man down, two short and two long blasts of the whistle.
Q. Is it unusual for freight trains coming in the yards, to be so long that they have to cut in *too* to come into the yards?
A. Light engines do it, most any time.
Q. If the train is so long they cannot come up the hill, don't they have to divide it up?
A. Not necessarily.
Q. But it is done though, when the freight train is a long one?
A. We usually take the switch engine and go down and pull them in.
Q. But if they don't have a switch engine convenient, what do they do, divide the train?
A. Always have a switch engine convenient.
Q. Well if you got a train—if you have a train there waiting for the switch engine to come and pull them in you protect the train? If you have a freight train tied up there, waiting for the engine to come and pull the train in, you signal the trains in the rear the tracks are occupied?

A. I do not have anything to do with the rear end of the train I run the engine, possibly the train is a hundred yards long.

By Mr. Bullock:

Q. Do you know the signature of C. R. Parish?
A. No, sir.

On cross-examination he said:

By Mr. Wilkinson:

Q. Mr. Carlton, is it anything unusual for cars to come uncoupled when the couplings are in good condition?
57 A. Well I have heard it. I have been on the road when they become uncoupled and go and look at the couplings and could not find anything wrong with them.
Q. That occurs when they appear to be in first class shape?
A. Yes sir, and then couple them up and go on the rest of the trip and never bother us.
Q. If this car had not come uncoupled, would this accident have happened?
A. No sir.

On redirect examination he said:

By Mr. Smith:

Q. When you couple cars together, don't you connect them with a chain, like they do passenger cars?
A. Have automatic couplers.
Q. In coupling you use a chain?
A. No, sir, not unless the draw bar pulls out.
Q. When making a regular trip, in addition to the coupling, don't they connect with a chain?
A. No, sir, not necessarily.
Q. Don't you do it ordinarily?
A. No, sir.
Q. You always do with a passenger train?
A. They do have safety chains on passenger trains.
Q. Have them on freight trains?
A. No, sir.
Q. You have not chains, safety chains on freight trains?
A. Not that I know of.
Q. Never seen any?
A. I don't remember any.
Q. If you had good brakes on that car, would it have run away?
A. I don't know.
Q. Don't you know, if it had had good brakes, he could have applied the brakes and stopped it?
A. Probably he would.
58 Q. If you turn a freight car loose, and it is running of its own momentum, don't they stop them with the hand brakes?
A. Yes sir.

Q. If the brakes are in good order they would stop a car?
A. Yes sir.
Q. Did you see this car that got away, did you take any notice of it that night before the accident?
A. No, sir.
Q. You cannot tell anything about it?
A. No, sir.
Q. You do not know whether they released the brakes one at a time on this car?
A. Yes sir.
Q. How?
A. They released the North car first, and the man walked back and released the second car.
Q. Then the third car?
A. Yes sir and the cars went to rolling.

By Mr. Bullock:

Q. After releasing them, they moved of their own motion?
A. Yes sir.
Q. After they released one it did not run?
A. I could not tell when it broke off.
Q. Didn't you know the air was released?
A. No air released.
Q. But whatever was used there to stop the car, when that was removed the car did not move down the main line?
A. That car did not move down the line until they all went together, when the man let the brakes off of the second car.
Q. When you put these cars in there, what was used to prevent their moving on the main line, the five cars?
A. The men set the brakes on them and put a chunk under them of some description.
Q. Could not tell what that was?
A. I saw them put something under it.
59 Q. Is it not a fact that that chunk was removed and the brakes released on that car, just as it moved?
A. Yes sir, it went down the main line, when they all went on together. That car was coupled because I saw the slack run out of that car.
Q. They have automatic couplers?
A. Yes sir.
Q. Easy thing to see whether it was in good order?
A. I saw it the next morning and could not see anything the matter with the coupler.
Q. Was not the end of the car knocked out?
A. No, sir.
Q. Was not the end knocked out, one end of the car?
A After it struck the North end was knocked out.
Q. It was a bad order car?
A. I did not see the tag.
Q. Don't you know that it was set out there as a bad order car?
A. Cars supposed to be on the rig track that are placed there are supposed to be bad order cars. I did not look at the tag.

Q. The fact it was placed in the repair track is indication it was a bad order car?

A. That would not be necessarily so, could place a private coach on the repair track, as far as that is concerned, while it was my understanding this car was a bad order car.

By Mr. Smith:

Q. You pushed the cars up the hill and left them?

A. We brought four cars down the hill and stopped in the clear.

Q. You brought them down where—was your engine in front of the car that ran away?

A. That car was on the rip track.

Q. You connected with the front end and pulled it out on the main line, switched that?

A. We moved it on the main line and cleared the rip track.

Q. Where did you connect up the car that got away, when you brought it out on the main line?

60 A. To the four cars that we pulled down there and stopped in the clear, we pulled those cars down there, cut off, backed up and headed into the rip track, coupled on to the car shoved it in the clear and backed in the rip track.

Q. You went and got this car and pushed it up on the main line with the others?

A. Yes sir, coupled it up to the others.

Q. Do you know whether it was coupled up or not?

A. Must have been.

Q. You don't know that of your own knowledge?

A. When they let the brakes off I saw the slack run out, if it had not been chocked they would all have run off.

Q. You think it was coupled?

A. Yes sir, the engine was headed up there.

Q. You have often been on the train and see them try two or three times before they could make a coupling?

A. Yes sir, and I have seen them make them the first time.

Q. Didn't you tell me that it was a dark night?

A. I did not say anything about the weather at all.

Q. Was it not a dark night?

A. Most all nights are dark.

Q. This was in November?

A. Yes sir, November 6th.

Q. You had a coal oil light for the switch engine?

A. Yes sir.

Q. That does not throw anything like as powerful light as an electric light?

A. That did not make any difference, it is customary to use oil lights for the switch engine.

Q. You did not pay any particular attention to the car that got away that night?

A. I saw the slack run out of it.

Q. You did not notice its condition?

A. No, sir.

On cross-examination he said:

61 By Mr. Wilkinson:

Q. With a heavily loaded car on a down grade, two or two and a half per cent grade, would the brakes have done much good to stop that car?

A. Well, owing to the condition they were in.

Q. With the brakes in good condition, would they have stopped the car?

A. I do not know how strong a man, a man could have stopped it in the course of time.

Q. The brakes were evidently in good condition when they couple-up on the main track?

A. I could not say, I never examined the brakes.

Q. You said the brakes were set on the car?

A. Yes sir, and a chock put under it, when the brakes were released the chock was removed, and the slack run out of that car.

Q. The brakes seemed to release?

A. I could not tell whether the brakes or the chock held it there, from where I was?

Q. You could not tell which it was that was holding it?

A. No, sir.

C. R. PARISH, witness for Plaintiff being first duly sworn, testified as follows:

On direct examination he said:

Q. Your name is C. R. Parish?

A. Yes sir.

Q. What is your business?

A. General Yard Master.

Q. For the Kansas City Southern Railway Company?

A. Yes sir.

Q. Was that your business in November 1911?

A. Yes, sir.

Q. Mr. Parish, examine this document and state if that is your signature?

(Handing witness document.)

A. No sir, not personally.

62 Q. That was written by your office?

A. Yes, sir.

Q. It went out of your office as a communication from the General Yard Master's office?

A. Yes, sir.

Q. Now examine this other document and tell us if that is the same kind?

(Handing witness document.)

A. Yes, sir, that came out of the office. It is not my signature. Think that was by the Chief Clerk. I do not remember what was his name at that time.

Q. I will ask you if these letters were written and sent out of your office?

A. Yes, sir, but I did not dictate those letters, neither did I sign them, that is the office work.

Q. Went out through your office?

A. Yes, sir.

Counsel for Plaintiff offers the documents referred to in Evidence.

Objected to by Counsel for Defendant on the ground and for the reason that they are not binding on the Defendant and not shown to have been authorized by the defendant and are the unsworn statement- of parties made, not representing the defendant and they are irrelevant and immaterial.

Objection sustained by the Court.

To which ruling of the Court, Counsel for Plaintiff excepts and asks that this note stand in lieu of formal bill of exceptions.

Q. Mr. Parish, in the discharge of your duties, as general Yard Master of the Company, are you not charged with investigating accidents happening in your jurisdiction? Are you charged with the duty of examining into accidents that happen within your jurisdiction?

A. Well partially so, I simply get up the reports and submit them to the Company.

63 Q. That is what you were doing when these letters were sent out, finding out from the men?

Objected to by Counsel for defendant as leading.

Objection sustained by the Court.

To which ruling of the Court, Counsel for Plaintiff except- and asks that this note stand in lieu of formal bill of exceptions.

Q. This is a letter addressed to Mr. R. Andrews, foreman of the shops, what was the object of that letter.

Objected to by Counsel for defendant as the letter shows for itself?

Objection sustained by the Court.

To which ruling of the Court, Counsel for Plaintiff excepts and asks that this note stand in lieu of formal bill of exceptions.

Counsel for Plaintiff offers the letter referred to in evidence.

Objected to by Counsel for Defendant for the reasons heretofore tated.

Objection sustained by the Court.

To which ruling of the Court, Counsel for Plaintiff excepts and a ks that this note stand in lieu of formal bill of exceptions.

Q. Mr. Parish, it was your duty to find out the facts and report them, is it not?

A. It is my duty as General Yard Master to get the reports together and submit them to the Company.

Q. How do you go about getting those reports?

A. Well, I check them up, I get them from the men.

Q. Do you go and interview them or write them letters?

A. Sometimes I interview them and sometimes write them.

Q. Well, when you make reports, you do not make verbal reports?

A. No, sir.

Q. Is it not the policy—state whether or not it is the policy of the railroad Company to get written reports, of every one connected with the accident or knows anything about it?

A. Yes, sir, that is the policy.

64 Q. After you get up the reports do you pass upon the question of who was to blame for it?

A. No, sir.

Q. Have you any right to pass on who was to blame for it?

A. No, sir.

Q. You get up the reports and submit them to the Company?

A. Yes, sir.

Q. You have no right to say this man was to blame or that man was to blame?

A. No, sir.

On redirect examination he said:

Q. But who is to blame, that notice of it comes through your office?

A. Well, the papers go through my office, the letter that you hold there went out of my office, without my knowledge, I neither dictated it or signed it.

Q. Well, it was in line with the duties of your office was it not.

Objected to by Counsel for defendant as leading.

Objection sustained by the Court.

To which ruling of the Court, Counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions.

Q. Whatever was the result of the investigation, it would be made known to your office would it not?

A. Well, the papers are gathered up and submitted to the Company.

Q Well now *is* a man was censored, or criticised, would not that come through your office? Would you not send for him and ask him to clear his record? What would you do if a criticism come to your office about one of your men? What would be your policy then?

A. Well criticising who?

Q. The officials who you had sent the papers of investigation to, had formed an opinion, from the reports sent in, would not that come back to your office?

A. In some cases it would.

Q. Then what would you do about the man criticised, would you give him an opportunity to defend himself?

65 A. Well, that is a question now, as to whether I would, or whether I would not.

Q. Have you ever done so?

A. When I handle the case personally myself, the criticism, if any is from the Company I frequently handle that and defend it myself, knowing the circumstances.

Q. Well, if you did not know the circumstances, would you take it up with the man that was criticised?

A. Well yes, I take cases frequently up with men.

Q. Suppose from your investigation, the Company wrote you that certain men should be reprimanded or censured, would you notify those men to come and clear themselves?

A. Well I would notify him that such was the case, but before notifying him, I would personally know that I had reason for notifying him.

Q. You would have charge of the man—you had made the investigation and sent the facts to the Company?

A. I had not made any investigation.

Q. But you do make investigations and send the reports in, you have stated that?

A. I did not, I gather up the reports and submit them to the Company.

Q. Through your office, there is a good deal of routine business that passes?

A. Yes, sir.

Q. You do not pretend to see every letter that goes out from that office?

A. Well no, I do not see every letter that goes out of there.

Q. You have trusted men, under you?

A. Yes, sir, I naturally have to have.

Q. They would not sign your name, unless it was in line of their business, and the business of the office would they?

A. That would depend upon the judgment he has, the Chief Clerk would construe the correspondence and handle it.

Q. He is left with some discretion?

A. Yes, sir.

66 Q. He is allowed some discretion in writing the letters?

A. No——

Q. He is not left any discretion at all in answering correspondence?

A. Yes, sir, I let him use his discretion in answering correspondence.

Q. Would not be a chief clerk if he did not have some fitness for it, and could not use some discretion in matters of business connected with the office?

A. Yes, he would be acting however.

Q. Do you know whose signature that is to that letter, who signed it?

A. I do not remember, I do not remember who was my chief clerk then?

Q. You recognize the hand writing as the writing of one of your chief clerks?

A. Yes, sir, I recognize the hand writing.

Q. As being that of one of your Chief Clerks?

A. Yes, sir.

Q. Without reading it to the Jury, I will ask you to read that let-

ter, and ask you if it is part of the business of your office it appertains to?

A. Now I never seen any correspondence connected with the case that would require the substance of that letter.

Q. Without saying what the letter contains, don't it speak of advices from higher sources of the Company?

A. Well, it would probably appear so, but I stated personally I never seen anything in the correspondence from our Company——

Q. Have you not a number of matters that you have not seen the correspondence of, that are handled by your Chief Clerk?

A. Yes, sir, but they are generally unimportant cases.

Q. The Chief Clerk used that discretion?

A. Yes, sir, it seems so in that case.

Counsel for Plaintiff now offers the letters referred to in evidence.

By Court:

Q. Mr. Parish, was your office the proper one for that letter to have eminated from—is your office the proper one for a letter like that to have originated from?

67 A. That letter is a little stronger—that letter is a little strong to originate from my office, for the reason I have seen most of these papers connected with the case now involved and I do not remember ever seeing any correspondence, or any letter connected with the correspondence which would require a response of a letter in that tone.

Q. What I mean Mr. Parish, was this, after the investigation has been made, is your office the proper party to notify any of the participants, the result of that investigation?

A. No sir, it is not. My office is not supposed to notify any participant of the result of the investigation.

By Mr. Smith:

Q. If there had been a reprimand placed against a man, would you- office have been the proper one to call attention to the fact?

A. My office—the papers might be returned for further investigation or something like that, and we would notify the people for further investigation.

Q. If the head office would send and say that one of your men should be reprimanded?

A. I never have seen anything from our head office that would bear out any such correspondence as that.

Q. I am talking about in ordinary cases, if a man was to be censured or reprimanded, would not the head office send that to you, so that you could communicate to that man?

A. Well, in some cases they might.

Q. Some cases they do, as a matter of fact, is it not so?

A. Yes sir, I guess so.

Counsel for Plaintiff now offers the letter referred to in Evidence.

Objected to by Counsel for Defendant on the grounds heretofore stated.

Objection overruled by the Court.

To which ruling of the Court, Counsel for Defendant excepts and asks that this note stand in lieu of formal bill of exceptions.

Filed in Evidence and marked exhibits "B C."

68 Counsel read same to Jury.

On cross-examination he said:

By Mr. Wilkinson:

Q. Mr. Parish, did you ever see any correspondence or ascertain any facts that would justify a reprimand of Mr. Andrews in connection with this matter?

A. No sir, I did not.

Q. This letter then was written without your knowledge or consent?

A. Yes sir.

Q. It don't make sence is says reprimand places against your record. (Counsel reads letter.) Have you any idea what the write was driving at when he says 'A reprimand has been placed against your record for responsibility and failure to be a brake of car that broke off.' Who repairs the brakes on the cars the foreman, the switch foreman does he repair the cars?

A. No, sir.

Q. He takes the cars as he finds them?

A. Yes sir.

Q. Was Mr. Andrews responsible for repairing the brake on that car that broke off?

A. No, sir.

Q. Who does the repairs?

A. The car repairer.

Q. The car repairer?

A. Yes sir.

Q. He goes and gets the cars as he finds them, that is the foreman of the switching crew?

A Yes sir, he assembles the cars and takes them to the repair track.

Q. Now that night in question Mr. Parish, they were taking these cars to the repair track, were they not?

A. Taking them from the repair track.

Q. Were they to be repaired, they were not to be sent out until they were repaired?

A. No, sir.

Q. This car that went wild, was in there for repairs?

69 A. Yes sir, that is my understanding——

Objected to by Counsel for Plaintiff as hearsay.

Objection sustained by the Court.

To which ruling of the Court, Counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions.

Q. Well, when a car is tagged with a bad order tag, is it sent out until it is repaired?

A. No, sir, it is not supposed to be, supposed to keep it until they get a chance to repair it.

Q. There is always noted on the bad order tag, the repairs that are necessary to the car?

A. Yes sir, it is customary.

Q. This tag has written on it 'Draft bolds and Draft timbers spread, does that affect the coupling apparatus?

A. Remember on which end, now if that would have been where the draft timbers are and the bolts were out sufficient to let the rear end of the draft timbers down.

Q. That might be so, with reference to one end, and not with reference to the other end?

A. Yes sir, and the end ought to be mentioned.

Q. "B end?"

A. That don't have anything to do with the other end of the car at all, this bad order end was mentioned on there.

Q. Mr. Parish, is it unusual for cars to come uncoupled with the automatic coupler?

A. It is not unusual. I have seen it in many cases.

Q. Where the couplers were in good condition?

A. Yes sir, and even after they become uncoupled that way we could so- no defect in the coupling and couple them up and they would go on.

On redirect examination he said:

By Mr. Smith:

Q. Mr. Andrews' duty you say was to examine the cars and send them to the repair track?

A. No, sir, not examine them, it was not Mr. Andrews' duty to examine the cars.

70 Q. Mr. Wilkinson asked you, if Mr. Andrews did not examine the cars and send them to the repair track?

A. No sir. This is not his business.

Q. After they are loaded his business is to see they get in to the repair tracks?

A. Yes sir.

Q. Now, you I believe stated the car is not supposed to go out with a bad order tag, they sometimes do let them go out?

A. No, sir.

Q. Never let them go out?

A. No, sir, not intentionally, hold them for repairs.

By Mr. Bullock:

Q. Mr. Andrews was foreman of the switch crew on the occasion of this wreck?

A. Yes sir.

Q. In this matter, the car was set out as a bad order car, was it Mr. Andrews' duty to take that car that was in bad order and transfer it from one part of the yard to another part?

A. He was to take the car to the transfer track, as I understand.

I was not there myself, I understood it was his intention to take the car to the transfer track.

Q. It was his duty to see the condition of the car before he moved it, in order to know where he should put it?

A. The condition would not have anything to do with its location.

Q. Would not have been placed on the repair track if it had been in good order?

A. No, sir, not if it had been in good order.

Q. Then was it his duty, knowing the car was in bad order—it was his duty to know the car was in bad order before he put it on the repair track?

A. Yes sir.

Q. Was it his duty to have seen the condition of the car in order to know how to handle it in making the transfer?

A. Yes sir.

It is admitted the ordinary live is seventy years.

71 C. S. Woods, witness for Plaintiff, being recalled testified as follows:

On direct examination he said:

Q. Do you recall the schedule or time car- that was in force November 6th, when this accident happened, the time you were running on then, when you were due here?

A. Yes sir.

Q. What was the last station you left before the accident?

A. Shehan.

Q. You left there at what time?

A. 10:35, that was our time.

Q. When did this accident occur?

A. Ten forty two, I think, to the best of my recollection.

Q. How do you fix that time?

A. Well, principally by Mr. Jones' watch, it was stopped.

Q. Where did you get his watch?

A. Took it out of his pocket when I pulled him off of the tender.

Q. Whose watch is this?

(Exhibiting watch to witness.)

A. This is the same style of watch that he was carrying.

It is admitted that this is the same watch.

Q. What time does that watch show?

A. Ten forty two and fifteen seconds.

Q. And that is the time showed by the watch that you took off of Mr. Jones at that time?

A. Yes sir.

Counsel for Plaintiff offers watch in evidence, with leave to withdraw same.

It is admitted that it stopped at the time he said it stopped.

Q. Did that make any impression on you when you looked at that watch?

A. Enough to look at my own, and I had about forty five or probably forty six.

Q. Yours showed forty five or forty six?

A. Yes sir, that was a few minutes after that, I had been busy with him.

72 Q. Was that about the time that you all were due at the place of the accident?

A. Yes sir, usual time along there, six to seven minutes' run from Shehan over there.

Q. When you reach the yards do you go fast or slow?

A. When we get in the yards we slow down, so as to have the train under control.

Q. So the time you are in the yards you are not making much time?

A. No, sir.

Q. Sitting in the cab of that engine before this accident, did you hear any whistle from any engine at all, any signal?

A. No, sir, not that I recollect of.

Q. When was the first time that you knew the switch engine was anywhere around?

A. Well someone asked if any passengers were hurt, that the switch engine was there, said the switch engine was down there that was the first I knew it was there and I could not get it through my head what they were doing down there, until afterwards.

Plaintiff closes.

—— ONEAL, witness for defendant being first duly sworn, testified as follows:

On redirect examination he said:

By Mr. Wilkinson:

Q. Mr. Oneal, explain what you all were doing with these cars at the time the car broke loose, and why you all were handling them?

A. These cars were bad order cars and were placed on the rip tract, and when they cannot be repaired loaded they are then sent to the transfer track and the load is transferred. This car being loaded could not be repaired with the load in there and we were taking the car from the rip tract to the transfer track.

Q. For what purpose?

A. For transferring the load.

Q. Unloading it?

A. Yes sir and loading the lumber into another car.

73 Q. After it was unloaded you expected to carry it back to the repair track?

A. Yes sir.

Q. Was there any bad order as to the coupling?

A. No sir, these orders on this car was draft bolts, the bolts that go from the inside into the sill that sets under the car and in shunting these cars around that shaved off the draft bolts, and in order to replace them the load has to be transferred, because the bolt has to

come from the inside of the car to the lower end of the sill. There might have been only one bolt holding it, and I would not have noticed the defect but the car inspector looks under the cars and notices those things.

Q. Which was the 'Bend' of the car, was that the end coupled on to?

A. I could not say, I am not familiar with that.

Q. When you set that car on the track, did the brakes appear to hold?

A. Yes sir.

Q. This card says 11-4?

A. That was the day it was put on there, that is the bad order tag.

Q. Set on that track?

A. Yes sir, set that day or the next day, probably lay around the yard a day before it was taken in there.

On cross examination he said:

Q. This accident occurred on November 6th 1911?

A. Yes sir.

Evidence closed.

I hereby certify that the above and foregoing is a true and correct translation of my Stenographic notes taken on the trial of the above numbered and entitled cause.

Shreveport, La., August 1st, 1913.

(Signed) R. B. COOK, *Stenographer.*

(Endorsed:) No. 17,089. Mrs. Nora M. Jones vs. Kansas City Southern Ry. Co.—Note of Evidence.—Filed Aug. 1, 1913.—(Signed) Chas. F. Crane, Dy. Cl'k.

74 Proceedings Had in the Supreme Court of Louisiana, as per Præcipe, to be Found at Page One of This Transcript.

(*Final Judgment.*)

(Extract from Minutes.)

NEW ORLEANS, MONDAY, April 12th, 1915.

The Court was duly opened, pursuant to adjournment.

Present—Their Honors: Frank A. Monroe, Chief Justice, and Olivier O. Provosty, Alfred D. Land, Walter B. Sommerville, and Charles A. O'Neill, Associate Justices.

His Honor, Mr. Justice O'Neill, pronounced the opinion and judgment of the Court in the following case:

No. 20144.

Mrs. Nora M. Jones, Administratrix,
vs.
Kansas City Southern Railway Company.

The judgment is affirmed at the cost of the appellant.

75 (*Opinion of the Supreme Court of Louisiana.*)

United States of America,
State of Louisiana:

Supreme Court of the State of Louisiana.

New Orleans, Monday, April 12, 1915.

The Court was duly opened, pursuant to adjournment.

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76

Monday, April 12, 1915.

Mr. Justice O'Niell.

No. 20144.

Mrs. Nora M. Jones, Administratrix,
vs.
Kansas City Southern Railway Company.

Appeal from the First Judicial District Court, Parish of Caddo, Hon. T. F. Bell, Judge.

This is a suit for damages for the death of the plaintiff's husband, father of her three minor children, who was killed in a wreck of a passenger train on which he was employed as engineer by the defendant company.

The plaintiff claimed $30,000 damages, $15,000 for her loss of her husband's support and $5,000 on behalf of each child. The action was brought under the Employers' Liability Act of Congress of the 22nd of April, 1908, amended by the Act of the 5th of April, 1910. The plaintiff's husband was killed while employed as engineer on a locomotive pulling a passenger train of the defendant railway company from Kansas City, Mo., into Shreveport, La. The train was wrecked by a runaway freight car that got away from the employes of the defendant company at its yards near Shreveport,

ran down the grade of the defendant's main line and collided with the inbound passenger train about three miles from Shreveport.

The plaintiff charges negligence on the part of the defendant company and its employees, in that the runaway car was known by them to be out of repair and not equipped with the safety appliances required by law and necessary to control it. She alleges that the defendant's employees were guilty of negligence in switching the car on the main line when they knew the passenger train was nearly due there; that they made a "flying switch" with the loaded
77 box car, which was in itself a dangerous operation; that the car was negligently allowed to run down a steep grade at a high rate of speed into a dangerous curve in the track; that there was no one on or in control of the runaway car at the time of the collision; that the defendant's employees abandoned the car just before the collision; and that, if any one was on the car, he was unable to control it because of its defective condition.

The defendant tendered bond and filed a motion to remove the case to the United States District Court, on the ground that the plaintiff and defendant are domiciled in different states. The application was denied and the defendant's counsel reserved a bill of exception-, which is urged on appeal.

In its answer, the defendant denied each and every allegation of negligence contained in the petition. The case was tried by a jury, and a verdict for $17,500 was rendered in favor of the plaintiffs, apportioned by the jury as follows: $5,000 in favor of the widow, $3,500 in favor of her seven-year old daughter, $4,000 in favor of her six-year-old daughter and $5,000 in favor of her two-year-old boy. Judgment was rendered accordingly, and the defendant has appealed.

Referring to the bill of exceptions taken to the refusal of the judge to order the case removed to the Federal Court, the defendant's counsel argue that the Act of Congress of April 5, 1910, amending the Employers' Liability Act of 1908, only provides that a cause shall not be removed on the ground solely that a Federal question is presented in a suit under the Act of Congress. They contend that the amending act was not intended to prevent the removal *for* a cause that existed before and independent of the Act of Congress of 1908, as when the plaintiff and defendant are domiciled in different states. They cite a decision to that effect by Judge Russell, of the United States Circuit Court for the Eastern District of Texas, in the case of Van Brimmer vs. Texas Railroad Co., 190 Fed. 394. The Act of Congress, however, makes no such exception. It provides that
78 "no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." This language was recently construed literally by the United States Supreme Court, in the case of Mondon vs. N. Y. N. H. & R. Co., 223 U. S. 1, where Mr. Justice Van Devanter expressed the opinion:

"We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the states, when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

Since the decision cited by the defendant's counsel was rendered

by Judge Russell, several decisions to the contrary have been rendered by other Circuit Courts of the United States. See Synod vs. Ry. Co., 192 Fed. 353; Strauss vs. Ry. Co., 193 Fed. 293; Lee vs. Ry. Co., 193 Fed. 685; Hulack vs. C. & N. W. Ry., 194 Fed. 747; McChasing vs. Ry. Co., 197 Fed. 85; Deatley vs. C. & O. Ry. Co., 201 Fed. 591; and Kelly's Admr. vs. C. & O. Ry., 201 Fed. 602.

We conclude that there was no error in refusing to remove the case to the United States District Court.

We also find in the record a plea of lis pendens, filed by the defendant's counsel, alleging that a suit between the parties hereto on the same cause of action was pending in the Federal Court. But, as no proof was offered in support of it, and as the plea has not been referred to in the defendant's counsel's oral argument nor in their printed brief, we assume that it has been abandoned.

The only witnesses who testified with regard to the cause of the collision were four employees of the defendant company, who were witnesses for the plaintiff. There is no conflict in their testimony on any important fact.

The south-bound passenger train No. 3, in charge of the engineer, Jones, was due in Shreveport at 10:50 o'clock on the night of the collision. The switching crew in the yards in West Shreveport had orders to clear the main track ten minutes—or perhaps five
79 minutes—before her schedule. Going in a northern direction from Shreveport, the track curves to the west and goes down grade to within a short distance from a bridge over Cross Lake about three miles from the city.

The defendant's switching crew was engaged until some time after ten o'clock on the night of the accident, setting out freight cars at the defendant's yards in West Shreveport. Working under orders of the night yard-master, the engineer on the switch engine pulled four empty freight cars out of the yard switch on the west side of the main line, and left them standing out on the main line while he went with his engine into the repair track on the east side of the main line to pull out a Rock Island box car loaded with lumber. This Rock Island car was tagged for repairs: "Draft bolts and draft timbers spread.—End knocked out." It had to be taken to the transfer track and unloaded, in order to be repaired. Hence it seems that it was necessary to put the Rock Island car at the north end of the four empties and have the switch engine at the opposite end of them. The engineer pulled the Rock Island car out of the repair switch, backed it up to the four empties, and, believing it had coupled automatically, ordered the brakeman to put a chock under its wheels and apply the hand brakes. Then he took the engine back into the repair track; ordered the switchman to remove the chock, release the hand brakes and let the five cars roll down past the engine. The testimony of the switchman furnishes a graphic description of the operations and the resulting runaway, viz:

"I was the field man, working under Andrews, foreman, and we set out, I believe, four empty cars that were to be put on the transfer track for transfer as bad order cars; and we then got hold of this Rock Island car, came out on the main line, set that against the

four empty cars, and that is what we call high line, by letting the brakes off the cars and running the engine past the cars and drop out so as to get on the other end and we expected to get in the clear about 10:35. We had three brakes set, two on the empties and the Rock Island, which I supposed had a good brake, and when we got the engine in the clear, Andrews says let them go, and I started to let the brakes off, first let them off the Rock Island car, then to the second and let them off, and the cars started and I went to the third and let that off, and we passed the point of the switch, and Andrews got on the head end and the man was at the
80 switch so as to let the engine out and come on down the main line to get these cars. After we went through the sag, under the viaduct, the Rock Island car separated from the empties. Q. The Rock Island car was the car on the north end? A. Yes, sir; and I hollered to Andrews (the foreman), I says, 'Dick, the cars have separated,' he says, 'get down and try to check it up.' We had then about five or six hundred feet from there to the old street car crossing and I ran along the ground and caught this car, expecting to stop it. I got on there then and it was going down about a two per cent grade and the brakes did not seem to apply. The fire seemed to fly from the wheels. I looked over the side. The engine then tried to catch this car, and Andrews got down and tried to make a coupling, I hollered the brakes were poor. He got within four feet of it once or twice, but the car was going faster than the engine could go. I think the car must have been going forty-five or fifty miles an hour, and they followed us down and seen they could not catch us and they blew the whistle. I stayed with the car. I understood that No. 3 was then about due out of Sheehan and we had four or five minutes. * * * I tried the brakes two or three times. I could see the headlight when I was half way down the hill. * * * I could not do anything. Then I looked at my watch a second time; and I thought the best thing I could do would be to stay with the car and give the people on the passenger train a chance for their lives. Q. When did the engineer abandon the chase? A. About half a mile from where we hit, they stopped; they did not want to come on down and be in the wreck; they blew the whistle."

In his testimony, the engineer who was on the switch engine described the race he made after the runaway car with his engine and three empty cars, viz:

"Q. The runaway car was ahead of the engine? A. No, sir, north of us. Q. It was going down the track and you were following it? A. Yes, sir. Q. Well did you speed up your engine to catch it? A. Yes, sir. Q. What was the reason the engine did not make the coupling? A. Could not catch the car. Q. Why didn't you speed up? A. I pulled her wide open. Q. When did you abandon the chase? A. When Number Three's head-light showed up coming across the bridge. Q. You slowed down then? A. I stopped. Q. What did you do then? A. I whistled the man down—two short and two long blasts of the whistle."

The fireman on the passenger train testified that he did not hear

the whistle of the switch engine; and there seems to have been no chance for the engineer, Jones, to save himself, if he did hear it. He was accustomed to being flagged at that place by the flagmen from freight trains that were unable to climb the grade. As usual, therefore, when he went over the Cross Lake bridge, he slowed down, had his train under control, and evidently believed that the switchman's lantern on the runaway car was that of a flagman of a tied-up freight train. His fireman described the wreck thus:

81 "We were coming in here on Number Three southbound passenger train, due at the shops at 10:50 p. m., and we passed Sheehan, the last station, and we always hurry up to get in so as to get out on time, and just as we came across the lake bridge, not over three or four car lengths from the bridge, Mr. Jones shut off the engine. We were in the habit of finding someone hung up on the hill, nearly every trip or two, and they would flag us and we would stop, and that is what I thought they had done that night. I set the fire in the engine and got where I thought I could see up the straight track; we were on a curve to the right, and I stuck my head out of the window to see how far up it was. I looked out just in time to see the switchman jump off. (The switchman referred to was on the wild car.) I did not wait to see any more. I made a jump and lit behind Jones in the gangway, and the next time I hit the ground and they hit, had not run a car length past me when they hit lying where I was. They were coming down the hill with a lumber box car. It threw Mr. Jones out of the cab; he was on the back end of the tender when I found him, dead, just gasping. He made all efforts possible, put it into the emergency, just as I was going across the gangway; he saw the car about the same time I did. The engine was reversed when I got back to it; and the emergency brakes were applied."

The passenger train had left the last station, Sheehan, at 10:35, on time. The watch on the dead engineer, examined three minutes after the collision, had stopped at 10:42:15. He had to go only about three miles in 7¾ minutes, to arrive in Shreveport on time.

The only evidence offered by the defendant, besides that elicited on cross-examination, was the testimony of the switchman who had climbed upon the runaway car and tried to stop it. After he had testified as a witness for the plaintiff, he was recalled by the defendant's counsel to prove that, when the car got away, it was being taken from the repair track to the transfer track to be there unloaded and returned to the repair track to be repaired. He also testified that the car seemed to couple when it was butted against the four empties and the brakes seemed to hold. It appears, however, that this witness was not a mechanic; and, in view of the fact that the wheels of this car had to be chocked when it was supposed to be coupled to four other cars with brakes on, and in view of the proof that the coupling and brakes both failed to work, we do not think it has been proven that the defects in the car did not affect its couplings or brakes. It is highly improbable that the defects in

82 the car and the failure of its coupling and brakes to be of any service were mere coincidences.

Considering how near it was to the time when the passenger train would arrive—and how dangerous it seems to be to let freight cars loose at the top of a grade on the main line of a railroad at any time—it was indeed gross negligence on the part of the yard foreman and switching crew to attempt to make a flying switch with a heavily loaded car which they knew was unfit for service and which they ought to have feared would get away from them. As was said in Mitchell vs. I. C. R. R. Co., 110 La. 637, citing numerous decisions: "Under such circumstances, the making of a running switch was gross negligence. Some authorities hold making running switches to be negligence per se."

On cross-examination of the fireman of the engine on the passenger train, the defendant's counsel asked him: "You did not have the passenger train under control?" To which the plaintiff's counsel objected on the ground that the defendant had not alleged that there had been contributory negligence on the part of the engineer. The objection was sustained, and, on plaintiff's counsel's request, it was ordered that it should apply to all such evidence. The defendant's counsel reserved a bill of exceptions, and insists that there was error in the ruling.

Section 3 of the Employers' Liability Act provides:

"That in all actions hereafter brought against any such common carrier by railroad and under or by virtue of any of the provisions of this Act to recover damages for personal injury to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; provided, that no such employe who may have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

The plea of contributory negligence, therefore has been abolished by the Federal statute, as a defense. But counsel for the defendant contend that contributory negligence may be shown without
83 pleading it, in mitigation of the damage, on the theory that any facts, not alleged by the defendant, may be proven to show less damages than are claimed by the plaintiff. This doctrine, supported by decisions in other jurisdictions, has no application to this case. Proof that there was contributory negligence on the part of the employee who was killed would not reduce the amount of damages suffered by his surviving widow and children on account of his death. It would only serve to reduce the liability of the defendant company. The provision of the statute, in this respect, is that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Hence the rule, requiring a defendant to plead contributory negligence in order to escape liability by proving such negligence, ought to require a plea of contributory negligence to admit proof of it to diminish the defendant's liability. In this case, however, it cannot be seriously

contended that the engineer on the passenger train could have avoided the collision or that there was any negligence whatever on his part. The fireman testified and it was not contradicted that the train had slowed down and was under control.

On the cross-examination of the plaintiff, the defendant's attorney asked her whether she was engaged to be married. Her attorney urged the objection that the matter was irrelevant; the court sustained the objection; and counsel for the defendant reserved a bill of exceptions. The evidence intended to be elicited was, in our opinion, admissible to show that the plaintiff might not be deprived of the support of a husband during the remainder of her life. But it is not probable that an answer to the question would have affected the verdict. We assume that the jury considered the widow's prospect of marrying again.

The evidence shows that Mr. Jones was fifty-three years of age at the time he was killed; was earning $175 a month; was sober and domestic in his habits, and kind to his wife and children. The verdict is not excessive.

The judgment is affirmed at the cost of the appellant.

84 *Syllabus.*

(1) The Act of Congress of April 5th, 1910, amending the Employers' Liability Act of April 22, 1908, expressly provides that a case within the provisions of that statute, filed in a state court having jurisdiction, shall not be removed to any Federal court. There is no exception of a case in which the plaintiff and defendant are domiciled in different states.

(2) It is gross negligence on the part of the employees of a railroad company to attempt to make a flying or running switch with a loaded box car, known to be out of repair, at the crest of a grade on the main line of track, when a passenger train is nearly due. And, if the box car runs away down the grade, collides with the incoming passenger train and kil-s the engineer, the railroad is liable in damages to his widow and children.

85 (*Application for Rehearing.*)

Supreme Court of State of Louisiana.

No. 20144.

Mrs. Nora M. Jones
vs.
Kansas City Southern Ry. Co.

In this cause now comes the defendant and shows unto the court that there is error in the opinion and decree herein:

1. The court erred in finding for the plaintiff in this case in any amount.

2. The court erred in holding that the defendant should have specially pleaded contributory negligence in order to prove same; and in not remanding the said case for the purpose of receiving proof to show the contributory negligence of the deceased.

3. The court erred in not remanding the case for the purpose of hearing evidence as to the probable early marriage of the wife of the deceased.

4. The court erred in the amount awarded to the plaintiff in this case, and should have confined the amount awarded to such amount as the beneficiaries lost on account of being deprived of the support of the said deceased.

Wherefore it prays for a rehearing in this case, and for judgment accordingly.

(Signed) ALEXANDER & WILKINSON,
Attorneys for the Defendant.

(Endorsed:) No. 20,144—Supreme Court Louisiana—Mrs. Nora M. Jones, Admx. vs. Kansas City Southern Railway Co.—Application for rehearing—Filed Apl. 21, 1915—(Signed) Paul E. Mortimer, Clerk.

86 (*Rehearing Refused.*)

(Extract from Minutes.)

NEW ORLEANS, Monday, May 10th, 1915.

The Court was duly opened, pursuant to adjournment.

Present—Their Honors: Frank A. Monroe, Chief Justice. And Olivier O. Provosty, Alfred D. Land, Walter B. Sommerville, and Charles A. O'Niell, Associate Justices.

By the Court.

No. 20144.

Mrs. NORA M. JONES, Administratrix,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY.

(With Reasons.)

It is ordered that the rehearing applied for in this case be Refused.

87 (*Opinion of the Court on Application for Rehearing.*)

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

NEW ORLEANS, Monday, May 10, 1915.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors: Frank A. Monroe, Chief Justice;

Olivier O. Provosty, Alfred D. Land, Walter B. Sommerville, Charles A. O'Niell, Associate Justices.

His Honor, The Chief Justice, Pronounced the opinion and Judgment of the Court in the following cases:

88 MONDAY, May 10th, 1915.

Mr. Chief Justice Monroe.

No. 20144.

Mrs. NORA M. JONES, Administratrix,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY.

On Application for Rehearing.

Defendant's Counsel contend that evidence of contributory negligence, on the part of the decedent, though not pleaded, and inadmissible to defeat recovery, should have been admitted for the mitigation of the damages claimed by the plaintiffs; and, upon reconsideration, we are inclined to the opinion that it should have been admitted if offered for that purpose; but it was not so offered. The record shows the following, upon the cross examination by defendant's Counsel, of the fireman of the passenger train, to-wit:

"Q. You did not have the train under control, then? Counsel for "plaintiff objects to any evidence as to contributory negligence "as same is not alleged. Objection sustained by the Court. To "which ruling of the Court, Counsel for defendant excepts and "asks that this note stand in lieu of formal bill of exceptions. "Counsel for plaintiff asks that this objection and ruling and bill "of exception- be made general, to apply to all such evidence; and, "it is so ordered."

The evidence was, therefore offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded.

It is said, in the brief filed in support of the application for rehearing, that, "the Court, after holding that evidence was admissible to show that the widow was engaged to be married," makes the statement that, "it is not probable that an answer to the question would have affected the verdict. We assume that the jury considered the widow's prospect of marrying again;" and it is argued that the "Court is without right to enter the domain of assumption, and assume that the jury considered any fact favorable to the de-
89 fendant, when it gave an exorbitant judgment in favor of the plaintiff." Our reconsideration of the matter has led to the conclusion that evidence as to the engagement of the plaintiff to be again married was irrelevant, for, non constat, that the engagement would result in marriage (and plaintiff's Counsel, in their reply brief, say, that it has not yet done so); and, if it should so result, non constat, that the condition of the plaintiff will thereby be bettered.

The learned Counsel complain of the amount of the award, and compare it with that awarded in the "Eichorn cases," in which a widow and children were given $17,000; but, those cases were decided several years ago, and, since then, the purchasing power of money has decreased and the cost of living has increased in a ratio which more than accounts for the difference, of $500, between those judgments and the judgment here rendered, even, though, as suggested, the present judgment, being governed by the federal statute, allows nothing, for any suffering of the deceased, or for the mental anguish of the plaintiffs, and, though it includes nothing in the way of punitory damages.

Upon the whole, we are satisfied that no injustice has been done, and the rehearing is, accordingly,

Refused.

O'Neill, J., is yet of the opinion that evidence of contributory negligence is not admissible without a plea to that effect, and that the objection to evidence that the widow was engaged went to the effect of the evidence.

Syllabus.

1. Under the federal employers' liability act, evidence of contributory negligence is inadmissible to defeat recovery, and even though admissible in mitigation of damages, is properly excluded, when not pleaded, and when offered generally and without restriction as to its intended effect.

2. In an action for damages, by a widow, for herself and minor children, for the negligent killing of the husband and father, evidence that the widow is engaged to be married again is irrelevant and inadmissible.

90 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify the foregoing eighty-nine (89) pages to be a true and faithful copy of certain proceedings had in the First Judicial District Court in and for the Parish of Caddo, in the suit wherein Mrs. Nora M. Jones, Administratrix, was plaintiff, and Kansas City, Southern Railway Company, was defendant; and, also, of certain proceedings had in this, the Supreme Court of the State of Louisiana, on the appeal taken by said defendant, which appeal is now on the files of this court under the No. 20,144; as per præcipe of counsel for plaintiff-in-error, to be found at page one of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court aforesaid, at the city of New Orleans, this the

1st day of June, Anno Domini, one thousand, nine hundred and fifteen.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

91 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Frank A. Monroe, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is Clerk of the Supreme Court of the State of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this the 1st day of June, Anno Domini, one thousand, nine hundred and fifteen.

[Seal Supreme Court of the State of Louisiana.]

FRANK A. MONROE,
Chief Justice Supreme Court of Louisiana.

92 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana hereby certify that the Supreme Court of the State of Louisiana is the highest Court of law in Louisiana, and that the Honorable Frank A. Monroe is the Chief Justice of said Court and that his signature to the above certificate is genuine.

In witness whereof, I hereunto set my hand and the seal of the Court aforesaid, at the city of New Orleans, this the 1st day of June, Anno Domini, one thousand, nine hundred and fifteen.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

93 (*Original Petition for Writ of Error.*)

Supreme Court of State of Louisiana.

No. 20144.

Mrs. Nora M. Jones, Administratrix,
vs.
Kansas City Southern Railway Company.

Considering itself aggrieved by the final decision of the Supreme Court of Louisiana in rendering judgment against it in the above entitled case, the defendant hereby prays a writ of error from the said decision and judgment to the Honorable United States Supreme Court, and an order fixing the amount of supersedeas bond. Assignment of errors herewith.

ALEXANDER & WILKINSON,
Attorneys for the Defendant.

(*Order Granting Writ of Error.*)

State of Louisiana,
Supreme Court:

Let the writ of error issue upon the execution of a bond by the Kansas City Southern Railway Company to Mrs. Nora M. Jones, Administratrix in the sum of Two thousand ($2,000.00) Dollars; such bond, when approved, to act as a supersedeas.

Dated May 15th, 1915.

[Seal Supreme Court of the State of Louisiana.]

FRANK A. MONROE,
Chief Justice of Supreme Court of Louisiana.

94 (*Original Assignment of Errors.*)

Supreme Court of Louisiana.

No. 20144.

Mrs. Nora M. Jones, Administratrix, Plaintiff,
vs.
Kansas City Southern Railway Company, Defendant.

Assignment of Errors.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having

the same reviewed in the U. S. Supreme Court makes the following assignment:

The Supreme Court of the State of Louisiana erred in holding and deciding that under Act of Congress of April 22nd, 1908, as amended by Act of Congress of April 5th, 1910, the tender of evidence of contributory negligence on the part of the deceased must be tendered for the restricted purpose of mitigating the damages to be awarded, and if not so tendered should be excluded, and that a suit brought under the terms of said act of Congress was not removable to the Federal Court because of diverse citizenship, and further that it erred in awarding to the administratrix of the deceased a lump sum for each beneficiary an amount in excess of that awarded by it to others where the elements of recovery were broader and more extensive and where recovery could be had for mental pain and suffering and for the death of the deceased, contrary to the terms of said act of Congress and in the contravention thereof.

The said errors are more particularly set forth as follows:

1. The court erred in holding that while evidence of contributory negligence on the part of the deceased was admissible to mitigate the amount of the damages to be awarded by the jury, under the Act of Congress known as the Employers' Liability Act, that yet in order that such evidence might be admitted that it should be offered for that specific purpose and not tendered generally, contrary to said Act of Congress.

2. The court erred in excluding evidence of the contributory negligence of the deceased tendered by the defendant because it was not admissible generally, under the Act of Congress known as the Employers' Liability Act, and when offered was not restricted by defendant then and there for the purpose of mitigating the amount of damages to be awarded, contrary to said Act of Congress.

3. The court erred in excluding evidence of the contributory negligence of the deceased which it held was admissible for the purpose of mitigating the damages to be awarded by holding that it must be restricted to that purpose and so tendered by the defendant, for the reason that under the Employers' Liability Act of Congress such evidence is admissible to mitigate the damages to be awarded and being so admissible it was the duty of the trial judge to instruct the jury that it should be considered by them in fixing the amount of damages to be awarded and should not be considered in determining the liability of the defendant, and it was not the duty of defendant under said Act of Congress to specifically limit the purpose or effect of such evidence at the time it was tendered, such limitation being fixed in the act itself.

95 4. The court erred in denying to the defendant the right to remove said cause to the United States District Court for the Western District of Louisiana, for the reason that said suit was of a civil nature wholly between citizens of different states and involved, exclusive of interest and cost more than three thousand dollars, the right of removal being given to the defendant because of such adverse citizenship by the constitution and laws of the United

States and particularly by Section 2 of Act of Congress of March 3rd, 1887, and the amendments thereto.

5. The court erred in awarding damages to the administratrix of the deceased without taking into consideration the elements for which damages are awarded under the Act of Congress, known as the Employers' Liability Act, approving and awarding her a sum in excess of that which it had allowed to others where the elements of recovery embraced not only loss of support as sued for in this case, but where the elements of recovery also embraced mental anguish, and a recovery for the death of the deceased, and the Supreme Court of the state of Louisiana by failing to give consideration to the elements of damages recoverable under said Act of Congress and by awarding a lump sum to each of the beneficiaries under said act, dodged the federal question thus presented and decided the same adversely to defendant, contrary to the terms and provisions of said Act of Congress, approved April 22nd, 1908, amended April 5th, 1910.

For which errors the defendant, the Kansas City Southern Railway Company, prays that said judgment of the Supreme Court of the State of Louisiana be reversed and a judgment rendered in favor of the defendant company, and for cost and general relief.

ALEXANDER & WILKINSON,
Attorneys for the Defendant.

95½ [Endorsed:] No. 20,144. Supreme Court, Louisiana. Mrs. Nora M. Jones vs. Kansas City Southern Railway Co. Petition for Writ of Error and Assignment of Error. Filed May 13th, 1915. Paul E. Mortimer, clerk.

96 (*Copy of Bond for Writ of Error.*)

Supreme Court of Louisiana.

No. 20144.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
Mrs. NORA M. JONES, Administratrix, Defendant in Error.

Bond.

Know all men by these presents, that we, the Kansas City Southern Railway Company as principal and the American Surety Company of New York, as surety, are held and firmly bound unto Mrs. Nora M. Jones, Administratrix, in the sum of Two Thousand Dollars, to be paid to the said Mrs. Nora M. Jones, Admr., to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 17th day of May, 1915.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the U. S. Supreme Court to reverse the judgment ren-

dered in the above entitled action by the Supreme Court of the State of Louisiana.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

KANSAS CITY SOUTHERN RAILWAY COMPANY,

(Signed) By J. D. WILKINSON, *Attorney.*

AMERICAN SURETY COMPANY OF NEW YORK,

(Signed) By JAS. G. PALMER,

Agent & Attorney in Fact.

97 Approved May 18, 1915.

[SEAL.] (Signed) FRANK A. MONROE,

Chief Justice Supreme Court of Louisiana.

(Endorsed:) No. 20,144. Supreme Court, Louisiana. Kansas City Southern Railway Co., Plaintiff in error, vs. Mrs. Nora M. Jones, Administratrix, Defendant in error. Bond. Filed May 18th, 1915. (Signed) Paul E. Mortimer, Clerk.

98 (*Original Writ of Error.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Louisiana before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mrs. Nora M. Jones, Administratrix, plaintiff, and the Kansas City Southern Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or
99 commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Kansas City Southern Railway Company, plain-

tiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable, Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 18th day of May, in the year of our Lord one thousand nine hundred and fifteen.

[Seal U. S. District Court for the Eastern District of La., N. O. Div.]

H. J. CARTER,
Clerk of the District Court of the United States for the Eastern District of Louisiana.

[Seal Supreme Court of the State of Louisiana.]

Allowed by
FRANK A. MONROE,
Chief Justice Supreme Court of the State of Louisiana.

[Endorsed:] No. 20,144. Kansas City Southern Railway Company, Plaintiff in error, versus Mrs. Nora M. Jones, Administratrix, defendant in error. Writ of Error. Filed May 18, 1915. Paul E. Mortimer, Clerk.

100 (*Certificate of Lodgment.*)

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that there was lodged with me as such clerk on May 13th, 1915, in the cause entitled:—Kansas City, Southern Railway Company, plaintiff-in-error, vs. Mrs. Nora M. Jones, Administratrix, defendant-in-error:—

First. The original petition for writ of error as herein set forth.

Second. The original assignment of errors as herein set forth; and,

Third. On May 18th, 1915, the original bond for writ of error, a copy of which is herein set forth.

Fourth. The original writ of error and three copies thereof: one to be served on plaintiff-in-error; one to be served on the defendant in error and one to be lodged in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the Court aforesaid, at the city of New Orleans, this the 1st day of June, Anno Domini, One thousand, nine hundred and fifteen.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court, State of Louisiana.

101 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to Mrs. Nora M. Jones, Administratrix, Shreveport, Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana, at New Orleans, wherein the Kansas City Southern Railway Company, is plaintiff-in-error, and Mrs. Nora M. Jones, Administratrix, is defendant-in-error, to show cause, if any there be, why the judgment rendered against the said Kansas City Southern Railway Company as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of United States, this 18th day of May in the year of our Lord one thousand nine hundred and fifteen.

[Seal Supreme Court of the State of Louisiana.]

FRANK A. MONROE,
Chief Justice of the Supreme Court of the State of Louisiana.

[Endorsed:] Supreme Court of the State of Louisiana. No. 20144. Kansas City Southern Railway Company, Plaintiff-in-error, vs. Mrs. Nora M. Jones, Administratrix, Defendant-in-error. Citation. Filed May 21, 1915. Paul E. Mortimer, Clerk.

Sheriff's —.

Received the within citation, together with a certified copy thereof with a certified copy of the writ of error therein mentioned on the 19th day of May 1915 and served the same on the within named Mrs. Nora M. Jones in person by handing the same to her at her residence

in the city of Shreveport, Louisiana, no miles from the court house in said parish.

N. P. TANNER,
Dy. Sheriff, Caddo Parish.

102 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to the Kansas City Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana, at New Orleans, wherein the Kansas City Southern Railway Company, is plaintiff-in-error, and Mrs. Nora M. Jones, Administratrix, is defendant-in-error, to show cause, if any there be, why the judgment rendered against the said Kansas City Southern Railway Company as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White Chief Justice of the Supreme Court of United States, this 18th day of May in the year of our Lord one thousand nine hundred and fifteen.

[Seal Supreme Court of the State of Louisiana.]

FRANK A. MONROE,
Chief Justice of the Supreme Court of the State of Louisiana.

[Endorsed:] Supreme Court of the State of Louisiana. No. 20,144. Kansas City Southern Railway Company, Plaintiff-in-error, vs. Mrs. Nora M. Jones, Administratrix, Defendant-in-error. Citation. Sheriff's —. Filed May 21, 1915. Paul E. Mortimer, Clerk.

Service accepted & writ received.
ALEXANDER & WILKINSON,
Att'ys for K. C. S. Ry. Co.

103 (*Return to Writ.*)

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same, as per præcipe of counsel for plaintiff-in-error, to be found at page one of this transcript.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Louisiana, in the City of New Orleans, this the 1st day of June, A. D. 1915.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

Endorsed on cover: File No. 24,771. Louisiana Supreme Court. Term No. 492. Kansas City Southern Railway Company, plaintiff in error, vs. Mrs. Nora M. Jones, administratrix of the succession of T. A. Jones, deceased. Filed June 11th, 1915. File No. 24,771.

Office Supreme Court, U. S.
FILED
FEB 19 1916
JAMES D. MAHER
CLERK

7

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1915

KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
MRS. NORA M. JONES, Administratrix of the succession of T. A. Jones, deceased, *Defendant in Error.*
No. 492

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

S. W. MOORE,
F. H. MOORE,
ALEXANDER & WILKINSON,
Attorneys for the Kansas City Southern Railway Company, Plaintiff in Error.

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II. The court erroneously excluded evidence of contributory negligence offered by defendant, and then erroneously held that the evidence conclusively showed that plaintiff's decedent was not guilty of contributory negligence 7

III. The Supreme Court of Louisiana finally held, on rehearing, that evidence of contributory negligence should have been admitted, under a general denial, in mitigation of damages. Consequently, that question, we take it, is not before this court, but we would say, in passing, that the court's holding on this point is amply sustained by authority 8

IV. The Supreme Court of Louisiana erroneously held, however, that, although the defendant had the right to offer such evidence in mitigation of damages, such evidence, in the present case, was properly excluded, since the defendant, in offering the evidence, did not expressly restrict it to that specific purpose 12

V. Since the rulings complained of by defendant were rulings concerning questions of law, including the question as to the legal effect of the evidence as to contributory negligence, and were with direct reference to the denial to defendant of a right or immunity claimed under the Federal Employers' Liability Act, they constitute Federal questions reviewable by this court 22

VI. The judgment in this case was the largest judgment in a death case ever approved by the Supreme Court of Louisiana, clearly showing the harmful effect of the errors complained of herein 25

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1915

KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
MRS. NORA M. JONES, Administratrix of the succession of T. A. Jones, deceased, *Defendant in Error.*
No. 492

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

STATEMENT.

Nora M. Jones, Administratrix, will be referred to as the plaintiff, and The Kansas City Southern Railway Company as the defendant.

This action was brought, tried, and decided under the Federal Employers' Liability Act. See paragraph II of plaintiff's petition (Rec., 2); decision of the trial court with reference to petition for removal (Rec., 7); and opinions of the Supreme Court of Louisiana (Rec., 52, 60).

Plaintiff's decedent, T. A. Jones, while employed by defendant as engineer on a passenger train running between DeQueen, Arkansas, and Shreveport, Louisiana, was instantly killed on November 6, 1911, in a collision, at Shreveport, between his train and a car of lumber which, while being switched, had gotten away

from a switching crew and run down the main track, part of which was on a down grade at that point.

The jury rendered a verdict in favor of the plaintiff in the sum of Seventeen Thousand, Five Hundred Dollars ($17,500.-00), which was affirmed by the Supreme Court of Louisiana. This, as hereinafter shown under separate heading, is concededly the largest verdict in a death case ever permitted to stand by that court.

The rights, privileges, and immunities claimed by defendant under the laws of the United States, which the trial court and the Supreme Court of Louisiana denied to defendant, and which constitute the Federal questions in the case, are the following:

1. The defendant sought to introduce evidence tending to show the contributory negligence of plaintiff's decedent, for the purpose of diminishing the amount of the damages claimed by plaintiff, all as provided in Section 3 of the Federal Employers' Liability Act; but the trial court, over the objection and exception of defendant (Rec., 25), excluded such evidence, and the Supreme Court of Louisiana affirmed the action of the trial court.

2. The Supreme Court of Louisiana did not correctly construe and apply the Federal Employers' Liability Act in the assessment of damages, to the prejudice of the defendant, thereby depriving it of rights, privileges, and immunities claimed by the defendant under that Act.

The defendant also claimed the right to remove the case to the Federal Court on account of diversity of citizenship, but this contention has been decided adversely to defendant's contention in the case of *Kansas City Southern Ry. Co.* v. *Leslie*, 238 U. S., 599.

Such further facts as may be necessary will be stated in the course of the argument.

The Main Question Involved in this Proceeding.

The principal question which this court is called upon to decide is whether, in an action arising under the Employers' Liability Act, the right of a defendant to secure a reduction in damages by proof of plaintiff's contributory negligence—a right created by the act itself—can be impaired, or lessened, or frittered

away, by any act, ruling, or rule of practice of the state court where the action is tried.

Our contention is the broad one that under the express terms of the act, the right of the defendant to introduce testimony to prove contributory negligence in diminution of damages is an absolute right. It is a shield created by the act itself, designed to protect the carrier against a recovery of more than a proportional amount of damages depending upon the relative degree of negligence of plaintiff and defendant. This is a *substantive right of defense*, arising under the Federal law, and it cannot be lessened or destroyed by any rule of practice.

In the present case, in which, as shown hereafter under a separate heading, the verdict was the largest in amount ever affirmed by the Supreme Court of Louisiana in a death case (Rec., 60), it is contended by the defendant that the trial court erred in refusing to permit it to introduce evidence of contributory negligence, and thus deprived the defendant of a federal right, within the rule stated by this court in *Norfolk Southern R. Co. v. Ferebee*, 238 U. S., 269, where the court says:

> But a substantive right of defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury.

ARGUMENT.

I.

The action by the highest court of the State of Louisiana in sustaining the exclusion by the trial court of evidence of the contributory negligence of plaintiff's decedent was erroneous, denied defendant a right claimed under the Federal Employers' Liability Act, and raises a Federal question reviewable by this court.

The question arose in the following manner:

The fireman testified that the collision, in which plaintiff's decedent was killed, occurred within or right at the beginning of the defendant's yard limits in the city of Shreveport, Louisiana.

> Q. How far from the company's yards did this wreck occur? A. I believe it is inside of the yard limit—I believe the yard limit board is at Cross Lake, but it seems to me the board was this side of where we struck at that time, half way up the hill (Rec., 20).

He further testified that the train should be *under control* while being operated through the yards; that it was a common occurrence to find the main track obstructed at this point by trains which had to be divided and handled in sections, or helped up the grade by other engines, although these obstructions were usually met with a little higher up the hill (Rec., 23-25, 49).

The fireman testified, also, that the train, of which plaintiff's decedent was engineer, was, at the time of the collision, running at a speed of between forty and forty-five miles an hour.

> Q. How far was this car coming down towards you, when you saw it? A. We were probably one hundred feet from it (Rec., 25).
>
> Q. About what speed were you all running at that time? A. *Between forty and forty-five miles an hour.*
>
> Q. Running between forty and forty-five miles an hour? A. Yes, sir.
>
> Q. You did not have the train *under control* then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged.
>
> Objection sustained by the court.
>
> To which ruling of the court counsel for defendant

excepts and asks that this note stand in lieu of formal bill of exceptions.

Counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered (Rec., 25).

The switchman who rode on the runaway car of lumber testified that although the car was running at a high rate of speed for a part of the time, it had, before the collision, slowed down to about fifteen miles an hour.

Q. That train (car) you say was going forty-five miles an hour? A. Yes, sir, the car was at one time but it had slowed down when it hit (Rec., 31).

Q. It was going at a pretty good speed, going down that hill? A. Well, it had slowed up about then, about struck the level grade.

Q. Do you mean that a car heavily loaded with lumber will slow up? A. Yes, sir, struck the level grade then.

Q. With the momentum acquired in coming down that hill, would it not go at a pretty lively rate? A. About fifteen miles an hour (Rec., 28-29).

Clearly there was here a situation which defendant was entitled to develop and to present to the jury, and which might have justified the jury in finding that the negligence of the engineer, plaintiff's decedent, in running his train at a speed of forty to forty-five miles an hour, *at a point where he should have had it under control*, contributed to the accident. The result might have been far different if the train had been running at a low rate of speed, or standing still, than where, as in this case, the train was running at a rate of forty to forty-five miles an hour. At any rate, it was a question for the jury to decide and, by the exclusion of evidence on this subject, the defendant was deprived of a right, privilege, and immunity under the Federal Employers' Liability Act.

In sustaining the above action of the trial court, the Supreme Court of Louisiana first held (Rec., 56-57), that evidence of contributory negligence cannot be introduced in actions under the Federal Employers' Liability Act, unless contributory negligence is pleaded, saying:

The plea of contributory negligence, therefore, has been abolished by the Federal statute, as a defense. But counsel

for the defendant contend that contributory negligence may be shown without pleading it, in mitigation of the damage, on the theory that any facts, not alleged by the defendant, may be proven to show less damages than are claimed by the plaintiff. This doctrine, supported by decisions in other jurisdictions, has no application to this case. Proof that there was contributory negligence on the part of the employee who was killed would not reduce the amount of damages suffered by his surviving widow and children on account of his death. It would only serve to reduce the liability of the defendant company. The provision of the statute, in this respect, is that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Hence the rule, requiring a defendant to plead contributory negligence in order to escape liability by proving such negligence, ought to require a plea of contributory negligence to admit proof of it to diminish the defendant's liability. In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision or that there was any negligence whatever on his part. The fireman testified and it was not contradicted that the train had slowed down and was under control.

In passing on defendant's petition for rehearing, the Supreme Court of Louisiana (Rec., 59) departed from the ruling that evidence of contributory negligence was inadmissible unless contributory negligence was affirmatively pleaded as a defense, saying:

> Defendant's counsel contend that evidence of contributory negligence, on the part of the decedent, though not pleaded, and inadmissible to defeat recovery, should have been admitted for the mitigation of the damages claimed by the plaintiffs; and, *upon reconsideration, we are inclined to the opinion that it should have been admitted if offered for that purpose; but it was not so offered.* The record shows the following, upon the cross examination by defendant's counsel, of the fireman of the passenger train, to-wit:
>
> Q. You did not have the train under control, then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged. Objection sustained by the court. To which ruling of the court, counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions. Counsel for plaintiff asks that this objection and ruling and bill of ex-

ceptions be made general, to apply to all such evidence; and it is so ordered.

The evidence was, therefore, offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded.

The answer of defendant (Rec., 11) amounted to a general denial. The plaintiff's petition (Rec., 4) alleged that the death of her decedent was due to the negligence of the defendant, "and that he (the decedent) *was in no way at fault or to blame for the same.*" This is denied in the defendant's answer (Rec., 11).

The above rulings of the court involved errors as to questions of law, including the legal effect of the evidence concerning contributory negligence; and as these rulings were against the defendant, and were with direct reference to a right claimed under the Federal Employers' Liability Act, they present Federal questions reviewable by this court.

II.

The court erroneouslv excluded evidence of contributory negligence offered by defendant, and then erroneously held that the evidence conclusively showed that plaintiff's decedent was not guilty of contributory negligence.

In the latter part of its original opinion, as quoted above, the Supreme Court of Louisiana says it cannot be seriously contended that there was any negligence on the part of the engineer, and that the fireman testified that the train had slowed down and was under control.

Whether the train was *under control* was the very question to which the court, by its ruling, prevented the defendant from securing an answer from the fireman. The court, as it did not permit the defendant to introduce evidence on this subject, could not tell what the evidence would establish. The evidence in the record shows that the engineer had shut off the steam, but that the train was running forty or forty-five miles an hour, at the time of the accident, at a point where we contend it should have been under control. Even on the evidence which was in the record, the court was not justified, it is submitted, in holding, as a

matter of law, that plaintiff's decedent was not guilty of contributory negligence, since different conclusions might reasonably be drawn by different persons, and it was, consequently, a jury question.

III.

The Supreme Court of Louisiana finally held, on rehearing, that evidence of contributory negligence should have been admitted, under a general denial, in mitigation of damages. Consequently, that question, we take it, is not before this court, but we would say, in passing, that the court's holding on this point is amply sustained by authority.

Contributory negligence, under the Federal Employers' Liability Act, is admissible only in mitigation of damages.

This court, in *Seaboard Air Line Railway* v. *Horton*, in opinion in case 541, Oct. Term, 1915, delivered January 10, 1916, said:

> This distinction * * * (between assumption of risk and contributory negligence) becomes important in actions founded upon the Federal Employer's Liability Act, which, in ordinary cases, recognizes assumption of risk as a complete bar to the action, while contributory negligence merely mitigates the damages * * *.

Evidence of contributory negligence was admissible under the general issue or general denial. Moreover, the issue was tendered in the plaintiff's petition (Rec., 4) where it was alleged that plaintiff's decedent was free from fault or negligence.

In *Hitchcock* v. *North*, 5 Rob., 328, the Supreme Court of Louisiana said:

> In an action for damages for a malicious prosecution, a defendant, under the general issue, may offer in mitigation of damages evidence of circumstances calculated to show that he had just cause to suspect the plaintiff of the offense with which he was charged.

Again, in the case of *Caspar* v. *Prosdame*, 46 La. Ann., 36, the same court said:

> Under the general issue in a suit for damages for injury to feelings and humiliation caused by an assault by the

> defendant on the plaintiff, and by the use of opprobrious epithets by the former, evidence of irritation and provocation was *admissible in mitigation of damages, but was not admissible to defeat the action.* (Our italics.)

In the last cited case the evidence was offered for all purposes, but the Supreme Court of Louisiana itself limited the effect of the testimony to a mitigation of the damages.

In the case of *Fortunich* v. *City of New Orleans*, 14 La. Ann., 115, the Supreme Court of Louisiana again had under consideration the question, and in passing on it said:

> In an action against the city corporation to recover damages done by a mob when the defense was a general denial; Held, that under the pleadings the *City might prove in mitigation of damages that the plaintiffs had exposed their property in the public market in violation of an ordinance of the city requiring the markets to be closed at the hour when the injury was done, but that such evidence could not be received as a complete bar to the action.* (Our italics.)

In the last cited case, as well as in the case of *Hitchcock* v. *North, supra*, the evidence was offered generally. In the *Fortunich case, supra*, the effect of the evidence was limited by the trial court to the mitigation of the damages; but in the Hitchcock case, the evidence was excluded by the trial court, and the Supreme Court of Louisiana reversed the judgment of the trial court, holding that the evidence was admissible in mitigation of damages, and should have been received for that purpose and so limited by the trial court.

In *United States* v. *Homestake Mining Company*, 117 Fed., 481, which was a suit for the unlawful conversion of ore and timber, the court said:

> In the second place, inasmuch as in actions for unliquidated damages for torts the plaintiff is required to prove his damages in the absence of any answer or denial, and the defendant generally has the right to cross-examine the plaintiff's witnesses, and to introduce evidence to mitigate or reduce the damages claimed (10 Enc. Pl. & Prac., p. 1156; *Parker* v. *Smith*, 64 N. C., 291, 292; *Bridges* v. *Stephenson*, 10 Ill. App., 369, 371; *Railroad Co.* v. *Holbrook*, 72 Ill., 419, 422; *Briggs* v. *Sneghan*, 45 Ind., 14, 24; *Lane* v. *Gilbert*, 9 How. Prac., 150, 152), the interposition of an answer which contains a general denial or a justifica-

tion does not deprive the defendant of this right. A defendant in an action to recover unliquidated damages for a tort may generally introduce evidence in mitigation of damages, except in actions for slander or libel, under a general denial in his answer; and there was no error in the admission of the defendant's evidence of innocence and good faith to mitigate the damages claimed by the government under the general denial and the justification pleaded in the answer of this defendant. *U. S.* v. *Van Winkle,* 51 C. C. A., 533, 113 Fed., 903, 905; *Booth* v. *Powers,* 56 N. Y., 22, 33; *Harter* v. *Crill,* 33 Barb., 283, 285; *Thompson* v. *Halbert,* (N. Y.) 16 N. E., 675; *Gentry* v. *U. S.,* 101 Fed., 51, 54, 41 C. C. A., 185, 188.

In *Canton-Hughes Pump Co.* v. *Llera,* 205 Fed., 215, the court said:

> We are asked not to reverse the judgment for this error, because the Pump Company's answer made no reference to the Pittsburg transaction; and so it is said, although it was not said in the court below, that the evidence was inadmissible for lack of a pleading basis, should have been excluded for that reason, and its exclusion, although for another reason, cannot be prejudicial error. We do not need to consider the force of such a position, if its premises were correct; but we are not satisfied that any applicable rule of pleading in Ohio imperatively requires such matter of defense to be pleaded. Though it has an affirmative aspect, it is really not affirmative, but is a matter in mitigation of damages, and it is held that such matters need not be pleaded. *Osborn* v. *Lovell,* 36 Mich., 246. There are decisions in Ohio which seem to recognize the same rule. *White* v. *Thomas,* 12 Ohio St., 312, 80 Am. Dec., 347; *Barholdt* v. *Wright,* 45 Ohio St., 177, 182; 12 N. E., 185, 4 Am. St. Rep., 535.

In *Beck* v. *Dowell,* 40 Mo. App., 75, the court said:

> The portion of the answer objected to, and which was stricken out by the court, contained a detailed statement of the circumstances under which the assault was made, and, if true, had a tendency to prove that the act complained of was justifiable, or, at least, was not wanton or malicious in its character.
>
> The action of the court in striking out this portion of the answer cannot be held to be error. In actions for personal injuries, evidence in mitigation of damages may be

given under a general denial. Boone on Code Pleading, sec. 76; *Hays* v. *Berryman*, 6 Bosw., 679; *Smith* v. *Lisher*, 23 Ind., 500. This was the rule at common law (2 Greenleaf on Evidence (14th Ed.) sec. 93) and it has not been changed by our Code of Civil Procedure. It is only in actions for slander or libel that mitigating circumstances may be set forth in the answer. R. S. 1879, Sec. 3553.

In *Mugg* v. *Ostendorf* (Ind.) 96 N. E., 784, the court said:

> Proof in mitigation of damages is held to be a matter of defense and admissible under the general denial. *Indianapolis St. Ry. Co.* v. *Robinson*, 157 Ind., 414, 416, 61 N. E., 936; *Gwinnup* v. *Shies*, 161 Ind., 500, 69 N. E., 158; *Ind. Trust Co.* v. *Finitzer*, 160 Ind., 647, 67 N. E., 520; *Blizzard* v. *Applegate*, 61 Ind., 368. In support of the rule as above declared, see, also, 22 Enc. Plead. & Prac., p. 1371; *Perkins* v. *Hart*, 11 Wheat. 237-250, 6 L. Ed., 463; *Schwartzel* v. *Karnes et al.*, 2 Kan. App., 782, 44 Pac., 41.

In *Osburn* v. *Lovell*, 36 Mich., 246, the third syllabus is as follows:

> Whatever in an action of tort would go in mitigation of damages may be given in evidence under the general issue.

In *Hopple* v. *Higbee*, 23 N. J. (3 Zab.) 342, the 5th and 6th syllabi are as follows:

> Facts in mitigation cannot be specially pleaded, but must be given in evidence under the general issue.
>
> Every plea in bar must be pleaded to the action. A plea to the damages merely is vicious.

In *Hugh Daily Admr.* v. *New York & N. H. R. R. Co.*, 32 Conn., 356, plaintiff's decedent had been struck and killed by a locomotive. The second syllabus is as follows:

> Upon a hearing in damages after a demurrer to a declaration charging an injury by the negligence of the defendant, the defendant may show, for the purpose of reducing the damages to a nominal sum, that the plaintiff was guilty of negligence directly contributing to the injury.

In *Yazoo & M. V. R. Co.* v. *Sultan* (Miss.), 63 S., 672, the court said:

> Counsel for cross appellant, Mr. Sultan, contend that, as there was only a plea of general issue filed, and no notice

given of special matter thereunder, that testimony relative to mitigation of damages by digging the ditch was not admissible. This has been settled by the case of *Grayson* v. *Brooks*, 64 Miss., 410, 1 So., 482, wherein Chief Justice Cooper, delivering the opinion of the court, said: "Matters in mitigation of damages merely should be given in evidence under the general issue, for by that plea the defendant puts upon the plaintiff not only the proof of his injury, but its extent." See, also,

Le Grand v. *Baker*, 22 Ky., 335;
Mayo v. *City of Springfield*, 138 Mass., 70;
Boggess v. *Metropolitan St. Ry. Co.*, 118 Mo., 328;
Huning v. *Chavez*, 34 Pac., 44;
Dunlap v. *Snyder*, 17 Barb., 561;
City of Waxahachie v. *Connors*, 35 S. W., 692;
Trustees of Dartmouth College v. *International Paper Company*, 132 Fed., 97;
Mosier v. *Stoll* (Ind.) 20 N. E., 754;
Havens v. *Hartford & N. H. R. R. Co.*, 28 Conn., 69.

IV.

The Supreme Court of Louisiana erroneously held, however, that, although the defendant had the right to offer such evidence in mitigation of damages, such evidence, in the present case, was properly excluded, since the defendant, in offering the evidence, did not expressly restrict it to that specific purpose.

For convenience, the record is again quoted:

Q. You did not have the train under control then?

Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged.

Objection sustained by the court.

To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions.

Counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered. (Rec., 25).

The purpose of the question, however, was clear. Plaintiff showed this by making objection to *any evidence as to contribu-*

tory negligence. The Federal Employers' Liability Act itself fixes the effect of such testimony. Section 3 of the act provides:

> Where such injuries have resulted in his (the employe's) death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

It was understood by all that the case at bar was governed by the Federal Employers' Liability Act (Rec., 2, 7).

Counsel for plaintiff further requested that his objection be made general to apply to all such evidence (Rec., 25), and the court so ordered, which would seem to have excused the defendant from any further efforts in this regard, even if they would otherwise have been necessary.

Under the authorities, however, the defendant fully discharged its duty with reference to the introduction of this evidence.

The rule is that if evidence is admissible for any purpose, it must be admitted. If the evidence is admissible only for a particular purpose, the opposing party should ask that its effect be so limited by proper instructions.

In 38 Cyc., p. 1340, the rule is stated as follows:

> Evidence competent for any purpose, or for or against certain parties, should be admitted, if offered generally, or for a proper purpose. If inadmissible for some purposes or for or against some parties, the court should by instruction, if requested so to do, limit its operation or effect.

In the case of *Buckstaff* v. *Russell*, 151 U. S., 626, 38 L. Ed., 292, 296, this court, with regard to the practice (except in cases where the exclusion is of an answer in a deposition) says:

> But this rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing him. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions, proper in form and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to the particular question pro-

pounded. Besides, and this is a consideration of some weight, such a statement, in open court, and in the presence of the witnesses, would often be the means of leading or instructing him as to the answer desired by the party calling him. If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.

In the case of *McAfee* v. *Crofford*, 13 Howard, 447, 456, 14 L. Ed., 217, 222, this court said:

> The plaintiff below then introduced the transcripts of two judgments in the District Court against Morgan McAfee, one in favor of Crofford, the other assigned to him, amounting to $2,100 and upwards, which, though objected to by the defendants, was admitted by the court. For what purpose this evidence was introduced was not stated; and under such circumstances, if the records of the judgment were admissible for any purpose, the exception to the evidence cannot be sustained. * * *
>
> We think that those judgments were properly admitted as evidence, because they conduced to show that Crofford, in removing with his slaves to Arkansas, was less blamable than charged by the defendant McAfee, as he had grounds to believe that a part of the bank judgment would be paid by McAfee, and that an indulgence of some years would be obtained for the payment of the balance.
>
> The judgments being admissible on this ground, it is unnecessary to inquire whether they were not evidence to reduce the bank judgment paid by McAfee, under his agreement. This point might have been made, if the court had been requested to instruct the jury that this effect could not be given to the evidence by the jury. The judgments being admissible for the purpose first stated, it is unnecessary to inquire, if it were practicable to do so, which it is not, how the evidence was applied by the jury.

In the case of *People* v. *Doyle*, 21 Mich., 221, 227, the court said:

> Whenever a question is made upon the admission of evidence, it is indispensable to consider the object for which it is produced, and the point intended to be established by it. * * * It frequently happens that an item of proof is plainly relevant and proper for one purpose, while wholly inadmissible for another which it would naturally tend to establish. And when this occurs the evidence when offered for the legal purpose can no more be excluded on the ground of its aptitude to show the unauthorized fact than its admission to prove such unauthorized fact can be justified on the ground of its aptness to prove another fact legally provable under the issue.

In the case of *State* v. *Farmer*, 84 Me., 440, 24 Atl., 985, the court said:

> That evidence properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose, is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it.

In the case of *Pegg* v. *Warford*, 7 Md., 582, 607, the court said:

> But it has been said, that as this evidence was received for all or either of the three purposes for which it was offered, unless it was legally applicable to each, the jury might have been misled, and applied it to one of the purposes to which it did not relate. To avoid such a result, it was the duty of the counsel objecting to have pointed out specifically the purpose to which the testimony had no legal application, and to ask its exclusion for such purpose. * * * We must assume, where evidence has been offered generally, that it will be applied by the jury to the purposes to which it is legally applicable; and if counsel wish to guard against the contingency of a misapplication of the evidence by the jury, they should ask the court as has already been said, to point out the branch of the case to which the evidence is not to be applied.

In *Wigmore on Evidence*, Sec. 13, the doctrine announced in the above three cases is unqualifiedly approved, and the author says:

> Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the court suffices

for that purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection.

In *Clark* v. *Hull*, 184 Mass., 164, 68 N. E., 60, the second syllabus is as follows:

> A coast survey chart * * * showing the roads within 20 leagues of the shore, is admissible to show the existence of a way; and if the other party desires to limit its use, he should request an instruction that it does not show the way to be a public one.

In *Ponder* v. *Cheaves*, 104 Ala., 307; 16 So., 145, the court said:

> If the evidence was competent for this purpose, and was admitted generally, the opposite party could not move its exclusion, but if he desired, should have requested instructions from the court, limiting its operation.

The rule is stated as follows in the second syllabus of *Farnsworth* v. *Nevada Company*, 102 Fed., 578:

> When a complaint states two or more causes of action, a judgment obtained thereunder cannot be reversed because of the admission of evidence which was competent under either count; and no obligation rests upon counsel, when offering testimony, to announce in advance to which count it is addressed, unless required to do so by the trial judge.

In *Mighell* v. *Stone*, 175 Ill., 261, 51 N. E., 906, the court said:

> Where evidence is competent for any purpose, it must be admitted; and, if its application should be restricted, it may be done by an instruction.

In *Hubbard* v. *Allyn*, 200 Mass., 166, 86 N. E., 356, the fourth syllabus is as follows:

> Where evidence is competent for any purpose, it is not rendered incompetent because it also tends to influence the mind in a direction for which alone it is incompetent; the remedy being by application to have it restricted to the purpose for which it is admissible.

In *Emrich* v. *Union Stock Yards Co.*, 86 Md., 482, 38 Atl., 943, the court said:

Where evidence is offered generally, it is error to reject it, if it is admissible for any purpose under the pleadings.

In *Cons. Ice Mach. Co.* v. *Keifer,* 134 Ill., 481, 25 N. E., 799, the fourth syllabus is as follows:

> The admission of evidence which is proper as against one defendant cannot be objected to by his co-defendant. The latter's remedy is to ask an instruction limiting the effect of the evidence.
>
> If (evidence is) offered generally it will be presumed to be offered for a proper purpose. 38 Cyc., 1341.

See, also:

Morris v. *Atlantic Ave. R. Co.,* 116 N. Y., 552; 22 N. E., 1097;

Hauff v. *S. D. C. Ry. Co.* (S. D.), 147 N. W., 986;

Birmingham Ry. L. & P. Co. v. *Barrett,* 179 Ala., 274; 60 So., 262, 265-267;

Coolidge v. *R. Co.,* 214 Mass., 568; 102 N. E., 74;

Mitchell v. *Harcourt,* 62 Ia., 349, 17 N. W., 581;

Commissioners v. *Gantt,* 78 Md., 286; 29 Atl., 610;

In re Potter, 161 N. Y., 84, 55 N. E., 387;

Gunn v. *Ohio River R. Co.,* 36 W. Va., 165; 14 S. E., 465;

Guertin v. *Town of Hudson,* 71 N. H., 505; 53 Atl., 736;

Bell v. *M. K. & T. Ry. Co.,* 36 Tex. Civ. App., 569; 82 S. W., 1073;

Shumard v. *Johnson,* 66 Tex., 70, 17 S. W., 398;

Boddy v. *Henry,* 126 Ia., 31; 101 N. W., 447, 449;

Aughey v. *Windrem,* 137 Ia., 315; 114 N. W., 1047;

Union Savings Association v. *Edwards,* 47 Mo., 445;

Ft. Worth & D. C. Ry. Co. v. *Harlan,* (Tex.), 62 S. W., 971;

Appleton Mill Co. v. *Warder,* 42 Minn., 117, 43 N. W., 791;

Kerbaugh v. *Caldwell,* 151 Fed., 195;

O'Connell v. *Cox,* 179 Mass., 250; 60 N. E., 580;

Bode v. *Lee,* 102 Cal., 583; 36 Pac., 936;

Fidelity & Dep. Co. v. *Nisbet,* 119 Ga., 316; 46 S. E., 444;

Ill. Steel Co. v. *Paczocha*, 139 Wis., 23; 119 N. W., 550;
Smith v. *Smith*, 106 Ind., 43; 5 N. E., 411;
Keesling v. *Doyle*, 8 Ind. App., 43; 35 N. E., 126;
C. & N. W. R. Co. v. *DeClow*, 124 Fed., 143;
Resurrection Gold Min. Co. v. *Fortune Gold Min. Co.*, 129 Fed., 668, 677;
Stanley v. *Beckham*, 153 Fed., 152, 155;
Prettyman v. *U. S.*, 180 Fed., 30, 38;
Himrod v. *Ft. Pitt Min. & Milling Co.*, 202 Fed., 724, 727.

As stated above, the rule established by the above cases is supported by the decisions of the Supreme Court of Louisiana.

In the case of *Fortunich* v. *City of New Orleans*, 14 La. Ann., 115, plaintiff sued for damages done by a mob, and the question was, whether, in mitigation of damages, defendant should have been permitted to introduce evidence of plaintiff's failure to comply with a city ordinance requiring the stalls at the market to be closed before the time when the damage was done. The court said:

> Had this ordinance been relied upon by the defendants as a complete bar to plaintiff's action, it could not have been offered in evidence under the general issue. But it does not appear, by the bill of exceptions, to have been offered for that purpose, and *the only question now is, was it admissible for any purpose?*
>
> It appears to us that it was admissible under Article 2303 of the Civil Code in mitigation of damages.

In *Thompson* v. *Chauveau* (La.), 6 Mart N. S., 462, the court said:

> This objection admits the legality of the evidence (a bill of sale) for a certain purpose. Had the case been before a jury, the party objecting to it on (as?) evidence for other purposes, ought to have requested the judge to charge the jury accordingly * * *.

In *Caspar* v. *Prosdame*, 46 La. Ann., 36, the court said:

> The court admitted testimony which was offered to prove irritation and provocation.

> The court admitted it and limited its effect to the mitigation of damages, and decided that it was not admissible under the general issue to prove irritation and provocation.
> * * *
> The evidence was admissible in mitigation, and was properly admitted with the restriction made. *Hitchcock* v. *North*, 5 R., 328.

The cases cited in plaintiff's brief, such as *Buechner* v. *City of New Orleans*, 112 La., 599, (p. 31 of brief) are not in point since they are cases in which plaintiff's contributory negligence is a complete defense, not cases where it simply mitigates the damages.

We have no criticism to offer of the numerous authorities cited by counsel for plaintiff as to the kind of question that this court will review on a writ of error, but most of their authorities, particularly on pages 8, 9, 10 and 11 of their brief, have no application to the question at all.

For instance, the case of *Cole* v. *Wharton*, 61 S. W., 503, related to an effort to introduce evidence, some of which was admissible and some of which was inadmissible, and the court properly held that all of it should be excluded.

Here the entire evidence was admissible to show the contributory negligence of the decedent, though it was not admissible as a defense, quite a different question from that presented in the authorities cited by counsel for plaintiff.

Plaintiff apparently takes the position that the court's action in excluding evidence of contributory negligence was correct, for the reason that, as plaintiff claims, the accident was due to defective safety appliances, and, in such cases, contributory negligence does not even mitigate the damages.

Plaintiff (p. 19 of brief) says:

> We submit that the Louisiana Supreme Court found from its review of the evidence in this case that the Federal Safety Appliance Act had been violated. That both the coupler and brake on the run-away car were defective, and that under the Federal Employers' Liability Act, under which this suit was brought, the defense of contributory negligence was not available to the plaintiff in error, the Kansas City Southern Railway Company.

This contention of plaintiff was not considered by the state court, and, we submit, is, therefore, not properly before this court. If this court should hold otherwise, however, our position is as follows:

Plaintiff contends that this court is bound by the state court's findings of fact. That rule, however, does not apply where a right is claimed under a Federal statute.

Kansas City Southern Railway Company v. *Albers*, 223 U. S., 591;
St. L. I. M. & S. Ry. Co. v. *McWhirter*, 229 U. S., 265.

There was, stating the matter most strongly in favor of plaintiff, a conflict of testimony as to whether the safety appliances were or were not defective. The Supreme Court of Louisiana (Rec., 55) said:

> The only evidence offered by the defendant, besides that elicited on cross examination, was the testimony of the switchman who had climbed upon the runaway car and tried to stop it. After he had testified as a witness for the plaintiff, he was recalled by the defendant's counsel to prove that, when the car got away, it was being taken from the repair track to the transfer track to be there unloaded and returned to the repair track to be repaired. He also testified that the car seemed to couple when it was butted against the four empties and the brakes seemed to hold. It appears, however, that this witness was not a mechanic; and, in view of the fact that the wheels of this car had to be chocked when it was supposed to be coupled to four other cars with brakes on, and in view of the proof that the coupling and brakes both failed to work, *we do not think it has been proven that the defects in the car did not affect its couplings or brakes.* It is highly improbable that the defects in the car and the failure of its coupling and brakes to be of any service were mere coincidences. (Our italics).

The contention that the coupler and brake were defective rests, we submit, solely on the facts that the runaway car which was being moved in order to be repaired, had certain defects which the court infers may have affected the coupler and brake, although there is no testimony to support such an inference; that the car became uncoupled and that the hand brake failed to stop at once a car which had obtained considerable headway on a down grade. Perfect couplers, however, do sometimes fail to couple,

and do become uncoupled; and the car may have attained such headway that the hand brake could not stop it at once. There is testimony tending to show that there were no defects in the coupler or brake (Rec., 34, 38, 39). Plaintiff's decedent was not engaged in coupling or uncoupling the car, and, so far as the Safety Appliance act is concerned, could not complain of the coupler, even if it had been defective, which we deny. *St. Louis & San Francisco R. Co.* v. *Conarty*, 238 U. S., 243. When the collision occurred, the speed of the car had been reduced from forty or forty-five miles an hour to fifteen miles an hour (Rec., 29-31), so that the brake may have been in perfect condition. The court certainly could not determine conclusively from the above evidence that the brake was defective. It was, considered most favorably to plaintiff, a question for the jury whether or not the brake was defective, and even if plaintiff's construction of the law with reference to safety appliances were correct, which we deny, the question of the contributory negligence of plaintiff's decedent should have been submitted to the jury to be considered by them in case they did not find that the brake was defective.

But, we contend that the provision making contributory negligence no defense, in case of a violation of the Safety Appliance act, applies only where the contributory negligence is in connection with the use by the employe of the defective safety appliance. The contributory negligence of plaintiff's decedent was in failing to have his train under control. He knew nothing of the alleged defective safety appliances, and was not guilty of contributory negligence in using or working about, or with reference to, those safety appliances.

A somewhat similar idea is expressed in the case of *St. Louis & San Francisco R. Co.* v. *Conarty*, 238 U. S., 243, 35 Sup. Ct. Rep., 785, in which the syllabus is as follows:

> A carrier's failure to have the end of a freight car equipped with the automatic coupler and drawbar prescribed by the safety appliance acts of March 2, 1893, April 1, 1896, March 2, 1903, and April 14, 1910, the purpose of which is to obviate the necessity for men to go between the ends of the cars, was not an actionable breach of duty toward an employe who was injured in a collision between such car and the switch engine on which he was riding, although had these appliances been present there would have been room enough

between the engine and the sill of the car to have prevented the injury, where there was no present intention or attempt to couple the car to the engine, or to handle it in any way.

Plaintiff's counsel (p. 20 of brief) take exception to defendants's third assignment of error, which is with reference to the exclusion of evidence of contributory negligence, the assignment being to the effect that the evidence should have been admitted and its effect limited by proper instructions. Plaintiff's counsel evidently make their objection under a misapprehension. The assignment is not directed against the instructions given by the court. No instructions could have been asked with reference to contributory negligence, since the evidence of contributory negligence was excluded. The assignment was against the exclusion of such evidence, and states that the court should have admitted the evidence and then properly limited its effect in the instructions to the jury.

V.

Since the rulings complained of by defendant were rulings concerning questions of law, including the question as to the legal effect of the evidence as to contributory negligence, and were with direct reference to the denial to defendant of a right or immunity claimed under the Federal Employers' Liability Act, they constitute Federal questions reviewable by this court.

The cause of action arose under and was governed by the Federal Employers' Liability Act. In such cases, in so far as a right or immunity under a Federal Act is involved, the court will examine the record, including the evidence where necessary, in order to determine whether such right or immunity has been improperly denied.

In the case of *Atlantic Coast Line Railway Company* v. *Burnette*, case No. 66, October term, 1915, decided November 29, 1915, 36 Sup. Ct., 75, the state court, against the contention of the defendant, held that the Federal Employers' Liability Act applied, and then, upon defendant's contending that, in that event, the suit was barred by the two-year statute of limitation, held that defendant could not raise the latter point for the reason that the limitation was not pleaded. This court said:

It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time (*Burnet* v. *Desmornes*, 226 U. S., 145, 57 L. Ed., 159, 33 Sup. Ct. Rep., 63); but when a party has meant to insist on all the rights it might have, such a result would be unusual and extreme. * * *

In dealing with the enactments of a paramount authority, such as Congress is within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. (Our italics.)

In *Chapman & Dewey Land Co.* v. *Bigelow*, 206 U. S., 41, 27 Sup. Ct. Rep., 679, 681, the court considered the correctness of a ruling on the exclusion of evidence, saying:

The result is unaffected by the exclusion from the evidence of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, November 17, 1902. It was clearly *res inter alios*, and properly rejected, and the ruling presented no Federal question.

In *Stanley* v. *Schwalby*, 162 U. S., 255, 278, 40 L. Ed., 960, 968, this court said:

But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.

In the case of *Kansas City Southern Railway Company* v. *Albers*, 223 U. S., 591, this court said:

While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.

In *St. L. I. M. & S. R. Co.* v. *McWhirter*, 229 U. S., 265, 33 Sup. Ct. Rep., 858, 862, this court said:

> As the cause of action alleged was exclusively placed on the Federal Statute, and the defense therefore alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination.
>
> While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat. Sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law; such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City Southern R. Co.* v. *Albers Commission Co.*, 223 U. S., 573, 591; 56 L. Ed. 556, 565; 32 Sup. Ct. Rep., 316; *Creswill* v. *Grand Lodge K. P.*, 225 U. S., 246; 56 L. Ed., 1074, 32 Sup. Ct. Rep., 822.

We are aware of the rule which is stated in the case of *Central Vermont R. Co.* v. *White*, 238 U. S., 507, 35 Sup. Ct. Rep., 865, 8th syllabus, as follows:

> Questions of general law raised in an action under the Federal Employers' Liability Act of April 22, 1908, which involve no construction of the Federal statute, and neither directly nor indirectly affect any Federal right, will not be reviewed on a writ of error from the Federal Supreme Court to a state court.

In the case at bar, however, the rulings above complained of did directly affect a Federal right: that of having the amount of damages reduced by proof of contributory negligence.

See also: *Norfolk Southern R. Co.* v. *Ferebee*, 238 U. S., 269, quoted in the opening statement of this brief.

VI.

The judgment in this case was the largest judgment in a death case ever approved by the Supreme Court of Louisiana, clearly showing the harmful effect of the errors complained of herein.

It should be remembered that the Supreme Court of Louisiana, upon an appeal, passes on questions of fact as well as of law (*Hosea's Widow* v. *Miles*, 13 La. R., 107, 110), and fixes the amount of damages, *increasing* or diminishing the amount of damages awarded by the jury in the trial court, if it thinks the amount should be increased or diminished.

Roby v. *Kansas City Southern*, 130 La., 58 Sou., 696;
Hosea's Widow v. *Miles*, 13 La. R., 107, 110;
Donnell v. *Sandford*, 11 La. Ann., 645;
Nation v. *Luddington*, 133 La., 657;
Strickland v. *Railroad*, 134 La., 238.

In this case the jury returned a verdict in favor of plaintiff for $17,500, apportioned as follows:

$5,000 in favor of the widow,
3,500 in favor of her seven-year old daughter,
4,000 in favor of her six-year old daughter, and
5,000 in favor of her two-year old boy.

And the Supreme Court affirmed a judgment for this amount.

An examination of plaintiff's petition (Rec., 4) shows that plaintiff sued for the support and maintenance of which the widow and children were deprived by the death of decedent. Paragraph 9 of the petition was stricken out, (see defendant's answer, Rec., 11) leaving only the allegation of damage contained in paragraph 10. See also amended and supplemental petition of plaintiff (Rec. 10).

In Louisiana a recovery is permitted for the pain and anguish of the survivors on account of the death of their decedent, also for the pain and suffering of decedent, in addition to the pecuniary loss of the beneficiaries on account of the death of decedent.

Plaintiff's right of recovery under the Federal Act is limited to loss of contributions, and no recovery can be had for grief,

wounded feelings, loss of society, affection or companionship. There was no allegation nor proof of pecuniary loss through deprivation of care and attention of the deceased.

Railway Co. v. *Vreeland*, 227 U. S., 59;
Railway Co. v. *Didricksen*, 227 U. S., 145;
Railway Co. v. *McGinnis*, 228 U. S., 173.

There was no claim in this case of damages on account of pain and suffering of the deceased, under section 9 of the Federal Employers' Liability Act, and could be none, since plaintiff's decedent was instantly killed (Rec., 16).

This being true, the recovery in the present case should have been less than the amounts awarded by the Supreme Court of Louisiana in cases governed by the State law, where the earnings and contributions of the deceased were as large as in the case at bar and his expectancy of life at least as great as in the case of plaintiff's decedent, since in the cases under the state law elements of damage are included which are not allowable under the Federal Act.

In the present case, however, instead of awarding less than was given in similar cases under the state law, the Supreme Court of Louisiana approved and allowed the largest amount that it had ever approved or allowed in a similar case.

In proof of this assertion, attention is called to the following cases decided by the Supreme Court of Louisiana where the elements of recovery were loss of support, mental pain and suffering of the survivors, and the amount which the deceased might have recovered had he survived the accident.

In 35 La., 609, the Supreme Court of Louisiana allowed to the wife and children of a decedent who lived and suffered twenty-four hours, the sum of $2,500.00.

In 117 La., 227, the Supreme Court of Louisana allowed the wife and children for the death of the husband and father, for all of the causes alleged, the sum of $3,000.00. Decedent was 22 years old and earning $9.00 per week.

In the case of *Robideaux* v. *Hebert*, 118 La., 1089, the Supreme Court of Louisiana allowed the widow and minor children of the deceased, for loss of support of the father and for mental

pain and suffering, and also for what decedent might have recovered had he survived the accident, the sum of $4,000.00.

The largest amounts ever awarded by the Supreme Court of the State of Louisiana in a case involving the death of the husband and father was in the case of *Eichorn* v. *Ry. Co.*, 112 La., 236, and 114 La., 712. In the first case the widow alone rerovered a judgment of $10,000 and in the second case his seven minor children recovered $7,000. Eichorn was only 39 years of age, whereas the deceased here was 53 years old, the first having an expectancy of forty years, and the latter an expectancy of sixteen years. Eichorn was earning $3,000 per annum, and Jones was earning about $2,100.

In the Eichorn case the grounds of recovery were much broader and more comprehensive and the total amount allowed was $17,000, whereas in the present case, where the ground of recovery is restricted to loss of support, the Supreme Court of Louisiana gives to the widow and children $500 more than it did in the Eichorn case, where there were seven children instead of three.

In the recent case of *Strickland* v. *Railroad Company*, 134 La., 238, the Supreme Court of Louisiana reduced a verdict in favor of the wife and children of the deceased to $12,000, just $5,500 less than it allows in the present case. Strickland was 46 years old and had a life expectancy of twenty-two years. It does not appear from the report of the case what amount he was earning.

In the case of *Nation* v. *Luddington*, 133 La., 657, it appears that the deceased was 38 years old and left a wife and three minor children, and the Supreme Court of the State of Louisiana increased the amount awarded to the sum of $10,000. But in this case, as in the others, recovery was permitted for the mental anguish of the wife and children, and likewise for such damages as the deceased might have recovered had he survived.

It therefore appears that, in the present case, the Supreme Court of Louisiana has approved a judgment for damages, for the death of a husband and father, larger than any judgment ever before approved by it. The opinion of the Supreme Court, in the case at bar, warrants the conclusion that this result was due not only to the erroneous exclusion of evidence of contribu-

tory negligence, but also to an erroneous interpretation and application of the Federal Act, by the Supreme Court, with reference to the measure of damages

VII.

The Supreme Court of Louisiana did not correctly interpret and apply the Federal Employers' Liability Act in the assessment of damages, and thereby deprived defendant of a right or immunity claimed under the act. This also presents a Federal question reviewable by this court.

In the original opinion of the state court (Rec., 57), no reference whatever was made to the elements of damage for which recovery might be had except the following:

> The evidence shows that Mr. Jones was 53 years of age at the time he was killed; was earning $175.00 per month; was sober and domestic in his habits and kind to his wife and children. The verdict is not excessive.

From this expression of the court it appears that it awarded the widow and children damages because decedent was a kind and affectionate husband and father, although no such elements of damage are allowable under the Federal Act, and none were attempted to be claimed in plaintiff's petition.

On the application for rehearing (Rec., 60), the court again referred to the amount of damages, saying:

> The learned counsel complained of the amount of the award and compared it with that awarded in the Eichorn cases in which a widow and children were given $17,000; but those cases were decided several years ago, and since then the purchasing power of money has decreased and the cost of living has increased in a ratio which more than accounts for the difference of $500 between those judgments and the judgment here rendered, even though, as suggested, the present judgment being governed by the Federal statute, allows nothing for any suffering of the deceased or for the mental anguish of the plaintiffs and though it includes nothing in the way of punitory damages.

In the above quotation, the court says nothing to justify a judgment for as large an amount as those awarded in similar

cases under the State Law, although the State Law permits an allowance for elements of damages not allowable under the Federal Act, and, at the same time includes all the elements which can be considered under the Federal Act. In support of the allowance of an increased amount over the highest amount permitted under the State Law, the court says:

> The purchasing power of money has decreased and the cost of living has increased;

clearly indicating that the court took into consideration the supposed greater needs of the beneficiaries, due to the increased cost of living, although there was no testimony that the fact that the cost of living had increased would increase the amount of decedent's earnings, nor of his contributions to his family, and the beneficiaries' right of recovery should have been limited to their pecuniary loss.

Plaintiff testified (Rec., 17) as follows:

> Q. Mrs. Jones, to live here in Shreveport and support your family in the manner in which you lived in Mr. Jones' time, about what would it take per month?
>
> A. Takes one hundred dollars per month, sometimes a little over.
>
> Q. That is living in the same manner you did in his time?
>
> A. Yes, sir.
>
> Q. Can you live on that amount now?
>
> A. Yes, sir.

We submit that while the common carriers of the country should not unduly burden the Supreme Court of the United States with these cases arising under the Federal Employers' Liability Act, nevertheless, a very serious burden is being placed upon the commerce of the country by the failure of the state courts to apply, frankly, and ingenuously, the principles of the act with reference to the assessment of damages, and this court cannot only save labor to itself, but perform a very great service, by clearly defining and insisting upon a logical and consistent application of such principles. Every common carrier of which we have any knowledge endeavors to settle every personal injury

case, even where the liability is doubtful, and the contests arise on account of the demand by the beneficiaries of amounts which are deemed to be excessive. It is a speculation in which the plaintiffs, at the present time, apparently have everything to gain and nothing to lose. In the present case, the plaintiff's decedent was 53 years of age at the time of his death. It was entirely unlikely that he would have continued to be employed as an engineer for the entire term of his life expectancy, which was 16 years, as alleged in plaintiff's petition (Rec., 4) The amount of his monthly contributions to his family, as testified to by his widow (Rec., 17) was about $100. This amount, without any discount on account of present payment, would, for the full term of his life expectancy, have amounted to $19,200: the amount awarded was $17,500.

At six per cent interest, a conservative rate in this section, this sum would have yielded $1050.00 per year, not much less than the amount of decedent's contributions, leaving the principal sum unimpaired.

We submit that this amount was clearly excessive. We are aware that this court does not consider the mere question of excessiveness of verdicts, but we do submit that it is not only its right, but its duty, to look carefully to see that the courts apply the correct principles in the awarding of the damages, and that the opinion of the Supreme Court of Louisiana in the present case shows that it clearly committed error in the interpretation and application of the provisions of the Federal Employers' Liability Act, as construed by this court, in the assessment of damages. The amount of the judgment shows that defendant was damaged by such error, as well as by the Court's refusal to admit evidence of contributory negligence.

It is contended in plaintiff's brief that the questions relied on were not properly raised. The Supreme Court of Louisiana, however, considered and passed on the questions, which was sufficient, if there were anything in this contention of plaintiff, which we deny.

As the court said in *Miedreich* v. *Lauenstein*, 232 U. S., 236:

> Although the record is meager of attempts to raise it, if the state court holds that a Federal question is made be-

fore it, according to its practice, and proceeds to determine it, this court regards the question as duly made. In *San Jose L. & W. Co.* v. *San Jose Ranch Co.*, 189 U. S., 177; 23 Sup. Ct. Rep., 487, 489, this court said:

> Under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words "specially set up and claimed" that it was fully considered in the opinion of the court and ruled against the plaintiff in error. (Citing cases.)

In *Kaukauna Water Company* v. *Green*, 142 U. S., 254, this court said:

> If the adjudication of a Federal question is necessarily involved in a decision of the case, it is not necessary that it should appear affirmatively in the record or in the opinion of that court that such question was raised and decided.

See, also:

Tennessee v. *Davis*, 100 U. S., 357;
Union Pacific Ry. Co. v. *Myers*, 115 U. S., 1;
Kansas City Southern Ry. Co. v. *Albers*, 223 U. S., 591;
Mallet v. *North Carolina*, 181 U. S., 589, 21 Sup. Ct. Rep., 730.

The non-technical manner in which the Supreme Court of Louisiana considers matters involved in a case which comes before it on appeal, is shown by the following expression of that Court in the case of *Covington* v *Roberson*, 111 La., 338, 35 So., 586, 591:

> This case is submitted to us by defendant without any complaint as to the instructions which were given by the court to the jury, and the charge itself is not in the record. As has been usual since the passage of the statute allowing objections to testimony to be noted by the clerk or stenographer in the note of evidence to stand in lieu of a formal bill of exceptions, a great many such objections were made on both sides, but none have been particularly called to our attention.
>
> We are substantially left to decide the issues upon the weight and sufficiency of the evidence, and through the ap-

plication by ourselves thereto of general principles of law bearing upon the subject-matter of slander.

We submit that the federal questions involved in the case at bar are substantial, and that the motion to dismiss or affirm should be denied.

Respectfully submitted,

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Office Supreme Court, U. S.
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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
MRS. NORA M. JONES, Administratrix of the succession of T. A. Jones, deceased,
Defendant in Error.
No. 492.

BRIEF OF PLAINTIFF IN ERROR.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*

vs.

MRS. NORA M. JONES, Administratrix of the succession of T. A. Jones, deceased, *Defendant in Error.*

No. 492.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

Nora M. Jones, Administratrix, will be referred to as the plaintiff, and The Kansas City Southern Railway Company as the defendant.

This action was brought, tried, and decided under the Federal Employers' Liability Act. See paragraph II of plaintiff's petition (Rec., 2); decision of the trial court with reference to petition for removal (Rec., 7); and opinions of the Supreme Court of Louisiana (Rec., 52, 60).

Plaintiff's decedent, T. A. Jones, while employed by defendant as engineer on a passenger train running between DeQueen, Arkansas, and Shreveport, Louisiana, was instantly killed on November 6, 1911, in a collision, at Shreveport, between his train and a car of lumber which, while being switched, had gotten away

from a switching crew and run down the main track, part of which was on a down grade at that point.

The jury rendered a verdict in favor of the plaintiff in the sum of Seventeen Thousand, Five Hundred Dollars ($17,500.-00), which was affirmed by the Supreme Court of Louisiana. This, as hereinafter shown under a separate heading, is concededly the largest verdict in a death case ever permitted to stand by that court.

The questions presented for consideration by this Court may be briefly stated as follows:

(a) The defendant sought to introduce evidence tending to show the contributory negligence of plaintiff's decedent, for the purpose of diminishing the amount of the damages claimed by plaintiff, all as provided in Section 3 of the Federal Employers' Liability Act; but the trial court, over the objection and exception of defendant (Rec., 25), excluded such evidence, and the Supreme Court of Louisiana affirmed the action of the trial court.

(b) The Supreme Court of Louisiana (Rec., 57, 60), did not correctly construe and apply the Federal Employers' Liability Act in the assessment of damages, to the prejudice of the defendant.

SPECIFICATION OF ERRORS.

The federal questions raised by the assignments of error, which are now relied upon, are as follows:

1. The trial court erred in excluding evidence offered by defendant to show that plaintiff's decedent was guilty of negligence contributing to the accident, and the Supreme Court of Louisiana erred in upholding the action of the trial court in this respect. As more fully detailed in subsequent headings, this question arose as follows:

The fireman, who was working with the engineer, plaintiff's decedent, at the time of the accident, testified that the accident occurred at or within the yard limits at Shreveport, and that the train should be under control while being operated through the yards. He further testified that it was a common occurrence to find the main track obstructed near this point by trains, which, on account of the grade, had to be divided and handled in sections, or helped up the grade by other engines. He also testified that the steam had been shut off, but that the train was running at the rate of 40 or 45 miles an hour at the time of the accident. The following (Rec., 25) then occurred:

> Q. You did not have the train under control then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged.
>
> Objection sustained by the court.
>
> To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions.
>
> Counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered (Rec., 25).

2. The Supreme Court of Louisiana in sustaining the amount of the judgment in this case, which was the largest in a death case ever sustained by the Supreme Court of that state, and larger than those approved under the state law, which included additional elements of damage, erroneously took into consideration the following elements of damage which are not allowable as elements of damage under the Federal Employers' Liability Act, and there-

by erroneously interpreted and applied that Act in the following particulars:

(a) By considering the fact that, according to the testimony, plaintiff's decedent was sober and domestic in his habits, and kind to his wife and children.

(b) By taking into consideration the increased cost of living, the court in that respect (Rec., 60) saying:

> The learned counsel complained of the amount of the award and compared it with that awarded in the Eichorn cases, in which the widow and children were given $17,000.00; but those cases were decided several years ago, and since then the purchasing power of money has decreased and the cost of living has increased in a ratio which more than accounts for the difference of $500.00 between those judgments and the judgment here rendered.

Such further facts as may be necessary will be stated in the course of the argument.

ARGUMENT.

I.

The Main Question Involved in this Proceeding.

The principal question which this court is called upon to decide is whether, in an action arising under the Employers' Liability Act, the right of a defendant to secure a reduction in damages by proof of plaintiff's contributory negligence—a right created by the act itself—can be impaired, or lessened, or frittered away, by any act, ruling, or rule of practice of the state court where the action is tried.

Our contention is the broad one that under the express terms of the act, the right of the defendant to introduce testimony to prove contributory negligence in diminution of damages is an absolute right. It is a shield created by the act itself, designed to protect the carrier against a recovery of more than a proportional amount of damages depending upon the relative degree of negligence of plaintiff and defendant. This is a *substantive right of defense,* arising under the Federal law, and it cannot be lessened or destroyed by any rule of practice.

In the present case, in which, as shown hereafter under a separate heading, the verdict was the largest in amount ever affirmed by the Supreme Court of Louisiana in a death case (Rec., 60), it is contended by the defendant that the trial court erred in refusing to permit it to introduce evidence of contributory negligence, and thus deprived the defendant of a federal right, within the rule stated by this court in *Norfolk Southern R. Co. v. Ferebee,* 238 U. S., 269, where the court says:

> But a substantive right of defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury.

The question arose in the following manner:

The fireman testified that the collision, in which plaintiff's decedent was killed, occurred within or right at the beginning of the defendant's yard limits in the city of Shreveport, Louisiana.

> Q. How far from the company's yards did this wreck occur? A. I believe it is inside of the yard limit—I believe the yard limit board is at Cross Lake, but it seems to me the board was this side of where we struck at that time, half way up the hill (Rec., 20).

He further testified that the train should be *under control* while being operated through the yards; that it was a common occurrence to find the main track obstructed at this point by trains which had to be divided and handled in sections, or helped up the grade by other engines, although these obstructions were usually met with a little higher up the hill (Rec., 23-25, 49).

The fireman testified, also, that the train, of which plaintiff's decedent was engineer, was, at the time of the collision, running at a speed of between forty and forty-five miles an hour.

> Q. How far was this car coming down towards you, when you saw it? A. We were probably one hundred feet from it (Rec., 25).
>
> Q. About what speed were you all running at that time? A. *Between forty and forty-five miles an hour.*
>
> Q. Running between forty and forty-five miles an hour? A. Yes, sir.
>
> Q. You did not have the train *under control* then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged.
>
> Objection sustained by the court.
>
> To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions.
>
> Counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered (Rec., 25).

The switchman who rode on the runaway car of lumber testified that although the car was running at a high rate of speed for a part of the time, it had, before the collision, slowed down to about fifteen miles an hour.

> Q. That train (car) you say was going forty-five

miles an hour? A. Yes, sir, the car was at one time but it had slowed down when it hit (Rec., 31).

Q. It was going at a pretty good speed, going down that hill? A. Well, it had slowed up about then, about struck the level grade.

Q. Do you mean that a car heavily loaded with lumber will slow up? A. Yes, sir, struck the level grade then.

Q. With the momentum acquired in coming down that hill, would it not go at a pretty lively rate? A. About fifteen miles an hour (Rec., 28-29).

Clearly there was here a situation which defendant was entitled to develop and to present to the jury, and which might have justified the jury in finding that the negligence of the engineer, plaintiff's decedent, in running his train at a speed of forty to forty-five miles an hour, *at a point where he should have had it under control,* contributed to the accident. The result might have been far different if the train had been running at a low rate of speed, or standing still, than where, as in this case, the train was running at a rate of forty to forty-five miles an hour. At any rate, it was a question for the jury to decide and, by the exclusion of evidence on this subject, the defendant was deprived of a right, privilege, and immunity under the Federal Employers' Liability Act.

In sustaining the above action of the trial court, the Supreme Court of Louisiana first held (Rec., 56-57), that evidence of contributory negligence cannot be introduced in actions under the Federal Employers' Liability Act, unless contributory negligence is pleaded, saying:

> The plea of contributory negligence, therefore, has been abolished by the Federal statute, as a defense. But counsel for the defendant contend that contributory negligence may be shown without pleading it, in mitigation of the damage, on the theory that any facts, not alleged by the defendant, may be proven to show less damages than are claimed by the plaintiff. This doctrine, supported by decisions in other jurisdictions, has no application to this case. Proof that there was contributory negligence on the part of the employee who was killed would not reduce the amount of damages suffered by his surviving widow and children on account of his death. It would only serve to reduce the liability of the defendant company. The provision of the statute, in this respect, is that "the damages shall be diminished by the jury

in proportion to the amount of negligence attributable to such employee." Hence the rule, requiring a defendant to plead contributory negligence in order to escape liability by proving such negligence, ought to require a plea of contributory negligence to admit proof of it to diminish the defendant's liability. In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision or that there was any negligence whatever on his part. The fireman testified and it was not contradicted that the train had slowed down and was under control.

In passing on defendant's petition for rehearing, the Supreme Court of Louisiana (Rec., 59) departed from the ruling that evidence of contributory negligence was inadmissible unless contributory negligence was affirmatively pleaded as a defense, saying:

> Defendant's counsel contend that evidence of contributory negligence, on the part of the decedent, though not pleaded, and inadmissible to defeat recovery, should have been admitted for the mitigation of the damages claimed by the plaintiffs; and, *upon reconsideration, we are inclined to the opinion that it should have been admitted if offered for that purpose; but it was not so offered.* The record shows the following, upon the cross examination by defendant's counsel, of the fireman of the passenger train, to-wit:
>
> Q. You did not have the train under control, then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged. Objection sustained by the court. To which ruling of the court, counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions. Counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general, to apply to all such evidence; and it is so ordered.
>
> The evidence was, therefore, offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded.

The answer of defendant (Rec., 11) amounted to a general denial. The plaintiff's petition (Rec., 4) alleged that the death of her decedent was due to the negligence of the defendant, "and that he (the decedent) *was in no way at fault or to blame for the same.*" This is denied in the defendant's answer (Rec., 11).

The above rulings of the court involved errors as to questions of law, including the legal effect of the evidence concerning contributory negligence; and as these rulings were against the defendant, and were with direct reference to a right claimed under the Federal Employers' Liability Act. they present Federal questions reviewable by this court. These errors will be discussed under the next three headings.

II.

The court erroneously excluded evidence of contributory negligence offered by defendant, and then erroneously held that the evidence conclusively showed that plaintiff's decedent was not guilty of contributory negligence.

In the latter part of its original opinion, as quoted above, the Supreme Court of Louisiana says it cannot be seriously contended that there was any negligence on the part of the engineer, and that the fireman testified that the train had slowed down and was under control.

Whether the train was *under control* was the very question to which the court, by its ruling, prevented the defendant from securing an answer from the fireman. The court, as it did not permit the defendant to introduce evidence on this subject, could not tell what the evidence would establish. The evidence in the record shows that the engineer had shut off the steam, but that the train was running forty or forty-five miles an hour, at the time of the accident, at a point where we contend it should have been under control. Even on the evidence which was in the record, the court was not justified, it is submitted, in holding, as a matter of law, that plaintiff's decedent was not guilty of contributory negligence, since different conclusions might reasonably be drawn by different persons, and it was, consequently, a jury question.

III.

The Supreme Court of Louisiana finally held, on rehearing, that evidence of contributory negligence should have been admitted, under a general denial, in mitigation of damages. Consequently, that question, we take it, is not before this court, but we would say, in passing, that the court's holding on this point is amply sustained by authority.

Contributory negligence, under the Federal Employers' Liability Act, is admissible only in mitigation of damages.

This court, in *Seaboard Air Line Railway* v. *Horton,* in opinion in case 541, Oct. Term, 1915, delivered January 10, 1916, said:

> This distinction * * * (between assumption of risk and contributory negligence) becomes important in actions founded upon the Federal Employer's Liability Act, which, in ordinary cases, recognizes assumption of risk as a complete bar to the action, while contributory negligence merely mitigates the damages * * *.

Evidence of contributory negligence was admissible under the general issue or general denial. Moreover, the issue was tendered in the plaintiff's petition (Rec., 4) where it was alleged that plaintiff's decedent was free from fault or negligence.

In *Hitchcock* v. *North,* 5 Rob., 328, the Supreme Court of Louisiana said:

> In an action for damages for a malicious prosecution, a defendant, under the general issue, may offer in mitigation of damages evidence of circumstances calculated to show that he had just cause to suspect the plaintiff of the offense with which he was charged.

Again, in the case of *Caspar* v. *Prosdame,* 46 La. Ann., 36, the same court said:

> Under the general issue in a suit for damages for injury to feelings and humiliation caused by an assault by the defendant on the plaintiff, and by the use of opprobrious epithets by the former, evidence of irritation and provocation was *admissible in mitigation of damages, but was not admissible to defeat the action.* (Our italics.)

In the case of *Fortunich* v. *City of New Orleans*, 14 La. Ann., 115, the Supreme Court of Louisiana again had under consideration the question, and in passing on it said:

> In an action against the city corporation to recover damages done by a mob when the defense was a general denial; Held, that under the pleadings the *City might prove in mitigation of damages that the plaintiffs had exposed their property in the public market in violation of an ordinance of the city requiring the markets to be closed at the hour when the injury was done, but that such evidence could not be received as a complete bar to the action.* (Our italics.)

In *United States* v. *Homestake Mining Company*, 117 Fed., 481, which was a suit for the unlawful conversion of ore and timber, the court said:

> In the second place, inasmuch as in actions for unliquidated damages for torts the plaintiff is required to prove his damages in the absence of any answer or denial, and the defendant generally has the right to cross-examine the plaintiff's witnesses, and to introduce evidence to mitigate or reduce the damages claimed (10 Enc. Pl. & Prac., p. 1156; *Parker* v. *Smith*, 64 N. C., 291, 292; *Bridges* v. *Stephenson*, 10 Ill. App., 369, 371; *Railroad Co.* v. *Holbrook*, 72 Ill., 419, 422; *Briggs* v. *Sneghan*, 45 Ind., 14, 24; *Lane* v. *Gilbert*, 9 How. Prac., 150, 152), the interposition of an answer which contains a general denial or a justification does not deprive the defendant of this right. A defendant in an action to recover unliquidated damages for a tort may generally introduce evidence in mitigation of damages, except in actions for slander or libel, under a general denial in his answer; and there was no error in the admission of the defendant's evidence of innocence and good faith to mitigate the damages claimed by the government under the general denial and the justification pleaded in the answer of this defendant. *U. S.* v. *Van Winkle*, 51 C. C. A., 533, 113 Fed., 903, 905; *Booth* v. *Powers*, 56 N. Y., 22, 33; *Harter* v. *Crill*, 33 Barb., 283, 285; *Thompson* v. *Halbert*, (N. Y.) 16 N. E., 675; *Gentry* v. *U. S.*, 101 Fed., 51, 54, 41 C. C. A., 185, 188.

In *Canton-Hughes Pump Co.* v. *Llera*, 205 Fed., 215, the court said:

> We are asked not to reverse the judgment for this error, because the Pump Company's answer made no reference to the Pittsburg transaction; and so it is said, although it

was not said in the court below, that the evidence was inadmissible for lack of a pleading basis, should have been excluded for that reason, and its exclusion, although for another reason, cannot be prejudicial error. We do not need to consider the force of such a position, if its premises were correct; but we are not satisfied that any applicable rule of pleading in Ohio imperatively requires such matter of defense to be pleaded. Though it has an affirmative aspect, it is really not affirmative, but is a matter in mitigation of damages, and it is held that such matters need not be pleaded. *Osborn* v. *Lovell*, 36 Mich., 246. There are decisions in Ohio which seem to recognize the same rule. *White* v. *Thomas*, 12 Ohio St., 312, 80 Am. Dec., 347; *Barholdt* v. *Wright*, 45 Ohio St., 177, 182; 12 N. E., 185, 4 Am. St. Rep., 535.

In *Beck* v. *Dowell*, 40 Mo. App., 75, the court said:

> The portion of the answer objected to, and which was stricken out by the court, contained a detailed statement of the circumstances under which the assault was made, and, if true, had a tendency to prove that the act complained of was justifiable, or, at least, was not wanton or malicious in its character.
>
> The action of the court in striking out this portion of the answer cannot be held to be error. In actions for personal injuries, evidence in mitigation of damages may be given under a general denial. Boone on Code Pleading, sec. 76; *Hays* v. *Berryman*, 6 Bosw., 679; *Smith* v. *Lisher*, 23 Ind., 500. This was the rule at common law (2 Greenleaf on Evidence (14th Ed.) sec. 93) and it has not been changed by our Code of Civil Procedure. It is only in actions for slander or libel that mitigating circumstances may be set forth in the answer. R. S. 1879, Sec. 3553.

In *Mugg* v. *Ostendorf* (Ind.) 96 N. E., 784, the court said:

> Proof in mitigation of damages is held to be a matter of defense and admissible under the general denial. *Indianapolis St. Ry. Co.* v. *Robinson*, 157 Ind., 414, 416, 61 N. E., 936; *Gwinnup* v. *Shies*, 161 Ind., 500, 69 N. E., 158; *Ind. Trust Co.* v. *Finitzer*, 160 Ind., 647, 67 N. E., 520; *Blizzard* v. *Applegate*, 61 Ind., 368. In support of the rule as above declared, see, also, 22 Enc. Plead. & Prac., p. 1371; *Perkins* v. *Hart*, 11 Wheat. 237-250, 6 L. Ed., 463; *Schwartzel* v. *Karnes et al.*, 2 Kan. App., 782, 44 Pac., 41.

In *Osburn* v. *Lovell,* 36 Mich., 246, the third syllabus is as follows:

> Whatever in an action of tort would go in mitigation of damages may be given in evidence under the general issue.

In *Hopple* v. *Higbee,* 23 N. J. (3 Zab.) 342, the 5th and 6th syllabi are as follows:

> Facts in mitigation cannot be specially pleaded, but must be given in evidence under the general issue.
>
> Every plea in bar must be pleaded to the action. A plea to the damages merely is vicious.

In *Hugh Daily Admr.* v. *New York & N. H. R. R. Co.,* 32 Conn., 356, plaintiff's decedent had been struck and killed by a locomotive. The second syllabus is as follows:

> Upon a hearing in damages after a demurrer to a declaration charging an injury by the negligence of the defendant, the defendant may show, for the purpose of reducing the damages to a nominal sum, that the plaintiff was guilty of negligence directly contributing to the injury.

In *Yazoo & M. V. R. Co.* v. *Sultan* (Miss.), 63 S., 672, the court said:

> Counsel for cross appellant, Mr. Sultan, contend that, as there was only a plea of general issue filed, and no notice given of special matter thereunder, that testimony relative to mitigation of damages by digging the ditch was not admissible. This has been settled by the case of *Grayson* v. *Brooks,* 64 Miss., 410, 1 So., 482, wherein Chief Justice Cooper, delivering the opinion of the court, said: "Matters in mitigation of damages merely should be given in evidence under the general issue, for by that plea the defendant puts upon the plaintiff not only the proof of his injury, but its extent."

See, also,

Le Grand v. *Baker,* 22 Ky., 335;
Mayo v. *City of Springfield,* 138 Mass., 70;
Boggess v. *Metropolitan St. Ry. Co.,* 118 Mo., 328;
Huning v. *Chavez,* 34 Pac., 44;
Dunlap v. *Snyder,* 17 Barb., 561;
City of Waxahachie v. *Connors,* 35 S. W., 692;
Trustees of Dartmouth College v. *International Paper Company,* 132 Fed., 97;
Mosier v. *Stoll* (Ind.) 20 N. E., 754;
Havens v. *Hartford & N. H. R. R. Co.,* 28 Conn., 69.

IV.

The Supreme Court of Louisiana erroneously held, however, that, although the defendant had the right to offer such evidence in mitigation of damages, such evidence, in the present case, was properly excluded, since the defendant, in offering the evidence, did not expressly restrict it to that specific purpose.

For convenience, the record is again quoted:

> Q. You did not have the train under control then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged.
>
> Objection sustained by the court.
>
> To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions.
>
> Counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered. (Rec., 25).

The purpose of the question, however, was clear. Plaintiff showed this by making objection to *any evidence as to contributory negligence*. The Federal Employers' Liability Act itself fixes the effect of such testimony. Section 3 of the act provides:

> Where such injuries have resulted in his (the employe's) death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

It was understood by all that the case at bar was governed by the Federal Employers' Liability Act (Rec., 2, 7).

Counsel for plaintiff further requested that his objection be made general to apply to all such evidence (Rec., 25), and the court so ordered, which would seem to have excused the defendant from any further efforts in this regard, even if they would otherwise have been necessary.

Under the authorities, however, the defendant fully discharged its duty with reference to the introduction of this evidence.

The rule is that if evidence is admissible for any purpose, it must be admitted. If the evidence is admissible only for a par-

ticular purpose, the opposing party should ask that its effect be so limited by proper instructions.

In 38 Cyc., p. 1340, the rule is stated as follows:

> Evidence competent for any purpose, or for or against certain parties, should be admitted, if offered generally, or for a proper purpose. If inadmissible for some purposes or for or against some parties, the court should by instruction, if requested so to do, limit its operation or effect.

In the case of *Buckstaff* v. *Russell,* 151 U. S., 626, 38 L. Ed., 292, 296, this court, with regard to the practice (except in cases where the exclusion is of an answer in a deposition) says:

> But this rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing him. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions, proper in form and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to the particular question propounded. Besides, and this is a consideration of some weight, such a statement, in open court, and in the presence of the witnesses, would often be the means of leading or instructing him as to the answer desired by the party calling him. If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.

In the case of *McAfee* v. *Crofford,* 13 Howard, 447, 456, 14 L. Ed., 217, 222, this court said:

> The plaintiff below then introduced the transcripts of two judgments in the District Court against Morgan McAfee, one in favor of Crofford, the other assigned to him, amounting to $2,100 and upwards, which, though objected to by the defendants, was admitted by the court. For what pur-

pose this evidence was introduced was not stated; and under such circumstances, if the records of the judgment were admissible for any purpose, the exception to the evidence cannot be sustained. * * *

We think that those judgments were properly admitted as evidence, because they conduced to show that Crofford, in removing with his slaves to Arkansas, was less blamable than charged by the defendant McAfee, as he had grounds to believe that a part of the bank judgment would be paid by McAfee, and that an indulgence of some years would be obtained for the payment of the balance.

The judgments being admissible on this ground, it is unnecessary to inquire whether they were not evidence to reduce the bank judgment paid by McAfee, under his agreement. This point might have been made, if the court had been requested to instruct the jury that this effect could not be given to the evidence by the jury. The judgments being admissible for the purpose first stated, it is unnecessary to inquire, if it were practicable to do so, which it is not, how the evidence was applied by the jury.

In the case of *People* v. *Doyle*, 21 Mich., 221, 227, the court said:

> Whenever a question is made upon the admission of evidence, it is indispensable to consider the object for which it is produced, and the point intended to be established by it. * * * It frequently happens that an item of proof is plainly relevant and proper for one purpose, while wholly inadmissible for another which it would naturally tend to establish. And when this occurs the evidence when offered for the legal purpose can no more be excluded on the ground of its aptitude to show the unauthorized fact than its admission to prove such unauthorized fact can be justified on the ground of its aptness to prove another fact legally provable under the issue.

In the case of *State* v. *Farmer*, 84 Me., 440, 24 Atl., 985, the court said:

> That evidence properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose, is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it.

In the case of *Pegg* v. *Warford*, 7 Md., 582, 607, the court said:

> But it has been said, that as this evidence was received for all or either of the three purposes for which it was offered, unless it was legally applicable to each, the jury might have been misled, and applied it to one of the purposes to which it did not relate. To avoid such a result, it was the duty of the counsel objecting to have pointed out specifically the purpose to which the testimony had no legal application, and to ask its exclusion for such purpose. * * * We must assume, where evidence has been offered generally, that it will be applied by the jury to the purposes to which it is legally applicable; and if counsel wish to guard against the contingency of a misapplication of the evidence by the jury, they should ask the court as has already been said, to point out the branch of the case to which the evidence is not to be applied.

In *Wigmore on Evidence*, Sec. 13, the doctrine announced in the above three cases is unqualifiedly approved, and the author says:

> Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the court suffices for that purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection.

In *Clark* v. *Hull*, 184 Mass., 164, 68 N. E., 60, the second syllabus is as follows:

> A coast survey chart * * * showing the roads within 20 leagues of the shore, is admissible to show the existence of a way; and if the other party desires to limit its use, he should request an instruction that it does not show the way to be a public one.

In *Ponder* v. *Cheaves*, 104 Ala., 307; 16 So., 145, the court said:

> If the evidence was competent for this purpose, and was admitted generally, the opposite party could not move its exclusion, but if he desired, should have requested instructions from the court, limiting its operation.

The rule is stated as follows in the second syllabus of *Farnsworth* v. *Nevada Company*, 102 Fed., 578:

When a complaint states two or more causes of action, a judgment obtained thereunder cannot be reversed because of the admission of evidence which was competent under either count; and no obligation rests upon counsel, when offering testimony, to announce in advance to which count it is addressed, unless required to do so by the trial judge.

In *Mighell* v. *Steve*, 175 Ill., 261, 51 N. E., 906, the court said:

> Where evidence is competent for any purpose, it must be admitted; and, if its application should be restricted, it may be done by an instruction.

In *Hubbard* v. *Allyn*, 200 Mass., 166, 86 N. E., 356, the fourth syllabus is as follows:

> Where evidence is competent for any purpose, it is not rendered incompetent because it also tends to influence the mind in a direction for which alone it is incompetent; the remedy being by application to have it restricted to the purpose for which it is admissible.

In *Emrich* v. *Union Stock Yards Co.*, 86 Md., 482, 38 Atl., 943, the court said:

> Where evidence is offered generally, it is error to reject it, if it is admissible for any purpose under the pleadings.

In *Cons. Ice Mach. Co.* v. *Keifer*, 134 Ill., 481, 25 N. E., 799, the fourth syllabus is as follows:

> The admission of evidence which is proper as against one defendant cannot be objected to by his co-defendant. The latter's remedy is to ask an instruction limiting the effect of the evidence.
>
> If (evidence is) offered generally it will be presumed to be offered for a proper purpose. 38 Cyc., 1341.

See, also:

Morris v. *Atlantic Ave. R. Co.*, 116 N. Y., 552; 22 N. E., 1097;

Hauff v. *S. D. C. Ry. Co.* (S. D.), 147 N. W., 986;

Birmingham Ry. L. & P. Co. v. *Barrett*, 179 Ala., 274; 60 So., 262, 265-267;

Coolidge v. *R. Co.*, 214 Mass., 568; 102 N. E., 74;

Mitchell v. *Harcourt*, 62 Ia., 349, 17 N. W., 581;

Commissioners v. *Gantt*, 78 Md., 286; 29 Atl., 610;

In re Potter, 161 N. Y., 84, 55 N. E., 387;
Gunn v. *Ohio River R. Co.*, 36 W. Va., 165; 14 S. E., 465;
Guertin v. *Town of Hudson*, 71 N. H., 505; 53 Atl., 736;
Bell v. *M. K. & T. Ry. Co.*, 36 Tex. Civ. App., 569; 82 S. W., 1073;
Shumard v. *Johnson*, 66 Tex., 70, 17 S. W., 398;
Boddy v. *Henry*, 126 Ia., 31; 101 N. W., 447, 449;
Aughey v. *Windrem*, 137 Ia., 315; 114 N. W., 1047;
Union Savings Association v. *Edwards*, 47 Mo., 445;
Ft. Worth & D. C. Ry. Co. v. *Harlan*, (Tex.), 62 S. W., 971;
Appleton Mill Co. v. *Warder*, 42 Minn., 117, 43 N. W., 791;
Kerbaugh v. *Caldwell*, 151 Fed., 195;
O'Connell v. *Cox*, 179 Mass., 250; 60 N. E., 580;
Bode v. *Lee*, 102 Cal., 583; 36 Pac., 936;
Fidelity & Dep. Co. v. *Nisbet*, 119 Ga., 316; 46 S. E., 444;
Ill. Steel Co. v. *Paczocha*, 139 Wis., 23; 119 N. W., 550;
Smith v. *Smith*, 106 Ind., 43; 5 N. E., 411;
Keesling v. *Doyle*, 8 Ind. App., 43; 35 N. E., 126;
C. & N. W. R. Co. v. *DeClow*, 124 Fed., 143;
Resurrection Gold Min. Co. v. *Fortune Gold Min. Co.*, 129 Fed., 668, 677;
Stanley v. *Beckham*, 153 Fed., 152, 155;
Prettyman v. *U. S.*, 180 Fed., 30, 38;
Himrod v. *Ft. Pitt Min. & Milling Co.*, 202 Fed., 724, 727.

The rule established by the above cases is supported by the decisions of the Supreme Court of Louisiana.

In the case of *Fortunich* v. *City of New Orleans*, 14 La. Ann., 115, plaintiff sued for damages done by a mob, and the question was, whether, in mitigation of damages, defendant should have been permitted to introduce evidence of plaintiff's failure to comply with a city ordinance requiring the stalls at the market to be closed before the time when the damage was done. The court said:

Had this ordinance been relied upon by the defendants as a complete bar to plaintiff's action, it could not have been offered in evidence under the general issue. But it does not appear, by the bill of exceptions, to have been offered for that purpose, and *the only question now is, was it admissible for any purpose?*

It appears to us that it was admissible under Article 2303 of the Civil Code in mitigation of damages.

In *Thompson* v. *Chauveau* (La.), 6 Mart N. S., 462, the court said:

This objection admits the legality of the evidence (a bill of sale) for a certain purpose. Had the case been before a jury, the party objecting to it on (as?) evidence for other purposes, ought to have requested the judge to charge the jury accordingly * * *.

In *Caspar* v. *Prosdame,* 46 La. Ann., 36, the court said:

The court admitted testimony which was offered to prove irritation and provocation.

The court admitted it and limited its effect to the mitigation of damages, and decided that it was not admissible under the general issue to prove irritation and provocation. * * *

The evidence was admissible in mitigation, and was properly admitted with the restriction made. *Hitchcock* v. *North,* 5 R., 328.

In *Caspar* v. *Prosdame, supra,* the evidence was offered generally, and the Supreme Court of Louisiana limited the effect of the testimony to mitigation of damages. In the Fortunich case, *supra,* and in *Hitchcock* v. *North,* 5 Rob., 328, the evidence was offered generally. In the Fortunich case, the effect of the evidence was limited by the trial court to the mitigation of the damages, but in the Hitchcock case, the evidence was excluded by the trial court, and the Supreme Court of Louisiana reversed the case, holding that the evidence was admissible in mitigation of damages, and should have been received for that purpose, and so limited by the trial court.

The cases cited in plaintiff's brief, (the brief referred to, here and subsequently, is plaintiff's brief on the motion to dismiss or affirm) such as *Buechner* v. *City of New Orleans,* 112

La., 599, (p. 31 of brief) are not in point since they are cases in which plaintiff's contributory negligence is a complete defense, not cases where it simply mitigates the damages.

We have no criticism to offer of the numerous authorities cited by counsel for plaintiff as to the kind of question that this court will review on a writ of error, but most of their authorities, particularly on pages 8, 9, 10 and 11 of their brief, have no application to the question at all.

For instance, the case of *Cole* v. *Wharton*, 61 S. W., 503, related to an effort to introduce evidence, some of which was admissible and some of which was inadmissible, and the court properly held that all of it should be excluded.

Here the entire evidence was admissible to show the contributory negligence of the decedent, though it was not admissible as a defense, quite a different question from that presented in the authorities cited by counsel for plaintiff.

Certain Points in Plaintiff's Brief.

Plaintiff apparently takes the position that the court's action in excluding evidence of contributory negligence was correct, for the reason that, as plaintiff claims, the accident was due to defective safety appliances, and, in such cases, contributory negligence does not even mitigate the damages.

Plaintiff (p. 19 of brief) says:

> We submit that the Louisiana Supreme Court found from its review of the evidence in this case that the Federal Safety Appliance Act had been violated. That both the coupler and brake on the run-away car were defective, and that under the Federal Employers' Liability Act, under which this suit was brought, the defense of contributory negligence was not available to the plaintiff in error, the Kansas City Southern Railway Company.

This contention of plaintiff was not considered by the state court, and, we submit, is, therefore, not properly before this court. If this court should hold otherwise, however, our position is as follows:

Plaintiff contends that this court is bound by the state court's findings of fact. That rule, however, does not apply where a right is claimed under a Federal statute.

Kansas City Southern Railway Company v. *Albers*, 223 U. S., 591;
St. L. I. M. & S. Ry. Co. v. *McWhirter*, 229 U. S., 265.

There was, stating the matter most strongly in favor of plaintiff, a conflict of testimony as to whether the safety appliances were or were not defective. The Supreme Court of Louisiana (Rec., 55) said:

> The only evidence offered by the defendant, besides that elicited on cross examination, was the testimony of the switchman who had climbed upon the runaway car and tried to stop it. After he had testified as a witness for the plaintiff, he was recalled by the defendant's counsel to prove that, when the car got away, it was being taken from the repair track to the transfer track to be there unloaded and returned to the repair track to be repaired. He also testified that the car seemed to couple when it was butted against the four empties and the brakes seemed to hold. It appears, however, that this witness was not a mechanic; and, in view of the fact that the wheels of this car had to be chocked when it was supposed to be coupled to four other cars with brakes on, and in view of the proof that the coupling and brakes both failed to work, *we do not think it has been proven that the defects in the car did not affect its couplings or brakes.* It is highly improbable that the defects in the car and the failure of its coupling and brakes to be of any service were mere coincidences. (Our italics).

The contention that the coupler and brake were defective rests, we submit, solely on the facts that the runaway car which was being moved in order to be repaired, had certain defects which the court infers may have affected the coupler and brake, although there is no testimony to support such an inference; that the car became uncoupled and that the hand brake failed to stop at once a car which had obtained considerable headway on a down grade. Perfect couplers, however, do sometimes fail to couple, and do become uncoupled; and the car may have attained such headway that the hand brake could not stop it at once. There is testimony tending to show that there were no defects in the coupler or brake (Rec., 34, 38, 39). Plaintiff's decedent was not engaged in coupling or uncoupling the car, and, so far as the Safety Appliance act is concerned, could not complain of the coupler, even if it had been defective, which we deny. *St. Louis & San Fran-*

cisco R. Co. v. *Conarty*, 238 U. S., 243. When the collision occurred, the speed of the car had been reduced from forty or forty-five miles an hour to fifteen miles an hour (Rec., 29-31), so that the brake may have been in perfect condition. The court certainly could not determine conclusively from the above evidence that the brake was defective. It was, considered most favorably to plaintiff, a question for the jury whether or not the brake was defective, and even if plaintiff's construction of the law with reference to safety appliances were correct, which we deny, the question of the contributory negligence of plaintiff's decedent should have been submitted to the jury to be considered by them in case they did not find that the brake was defective.

But, we contend that the provision making contributory negligence no defense, in case of a violation of the Safety Appliance act, applies only where the contributory negligence is in connection with the use by the employe of the defective safety appliance. The contributory negligence of plaintiff's decedent was in failing to have his train under control. He knew nothing of the alleged defective safety appliances, and was not guilty of contributory negligence in using or working about, or with reference to, those safety appliances.

A somewhat similar idea is expressed in the case of *St. Louis & San Francisco R. Co.* v. *Conarty*, 238 U. S., 243, 35 Sup. Ct. Rep., 785, in which the syllabus is as follows:

> A carrier's failure to have the end of a freight car equipped with the automatic coupler and drawbar prescribed by the safety appliance acts of March 2, 1893, April 1, 1896, March 2, 1903, and April 14, 1910, the purpose of which is to obviate the necessity for men to go between the ends of the cars, was not an actionable breach of duty toward an employe who was injured in a collision between such car and the switch engine on which he was riding, although had these appliances been present there would have been room enough between the engine and the sill of the car to have prevented the injury, where there was no present intention or attempt to couple the car to the engine, or to handle it in any way.

Plaintiff's counsel (p. 20 of brief) take exception to defendants's third assignment of error, which is with reference to the exclusion of evidence of contributory negligence, the assignment being to the effect that the evidence should have been admitted

and its effect limited by proper instructions. Plaintiff's counsel evidently make their objection under a misapprehension. The assignment is not directed against the instructions given by the court. No instructions could have been asked with reference to contributory negligence, since the evidence of contributory negligence was excluded. The assignment was against the exclusion of such evidence, and states that the court should have admitted the evidence and then properly limited its effect in the instructions to the jury.

V.

Since the rulings complained of by defendant were rulings concerning questions of law, including the question as to the legal effect of the evidence as to contributory negligence, and were with direct reference to the denial to defendant of a right or immunity claimed under the Federal Employers' Liability Act, they constitute Federal questions reviewable by this court.

The cause of action arose under and was governed by the Federal Employers' Liability Act. In such cases, in so far as a right or immunity under a Federal Act is involved, the court will examine the record, including the evidence where necessary, in order to determine whether such right or immunity has been improperly denied.

In the case of *Atlantic Coast Line Railway Company* v. *Burnette,* case No. 66, October term, 1915, decided November 29, 1915, 36 Sup. Ct., 75, the state court, against the contention of the defendant, held that the Federal Employers' Liability Act applied, and then, upon defendant's contending that, in that event, the suit was barred by the two-year statute of limitation, held that defendant could not raise the latter point for the reason that the limitation was not pleaded. This court said:

> It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time (*Burnet* v. *Desmornes,* 226 U. S., 145, 57 L. Ed., 159, 33 Sup. Ct. Rep., 63); but when a party has meant to insist on all the rights it might have, such a result would be unusual and extreme. * * *

In dealing with the enactments of a paramount authority, such as Congress is within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. (Our italics.)

In *Chapman & Dewey Land Co.* v. *Bigelow*, 206 U. S., 41, 27 Sup. Ct. Rep., 679, 681, the court considered the correctness of a ruling on the exclusion of evidence, saying:

> The result is unaffected by the exclusion from the evidence of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, November 17, 1902. It was clearly *res inter alios*, and properly rejected, and the ruling presented no Federal question.

In *Stanley* v. *Schwalby*, 162 U. S., 255, 278, 40 L. Ed., 960, 968, this court said:

> But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.

In the case of *Kansas City Southern Railway Company* v. *Albers*, 223 U. S., 591, this court said:

> While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.

In *St. L. I. M. & S. R. Co.* v. *McWhirter*, 229 U. S., 265, 33 Sup. Ct. Rep., 858, 862, this court said:

> As the cause of action alleged was exclusively placed on the Federal Statute, and the defense therefore alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination.

> While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat. Sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law; such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City Southern R. Co.* v. *Albers Commission Co.*, 223 U. S., 573, 591; 56 L. Ed. 556, 565; 32 Sup. Ct. Rep., 316; *Creswill* v. *Grand Lodge K. P.*, 225 U. S., 246; 56 L. Ed., 1074, 32 Sup. Ct. Rep., 822.

We are aware of the rule which is stated in the case of *Central Vermont R. Co.* v. *White*, 238 U. S., 507, 35 Sup. Ct. Rep., 865, 8th syllabus, as follows:

> Questions of general law raised in an action under the Federal Employers' Liability Act of April 22, 1908, which involve no construction of the Federal statute, and neither directly nor indirectly affect any Federal right, will not be reviewed on a writ of error from the Federal Supreme Court to a state court.

In the case at bar, however, the rulings above complained of did directly affect a Federal right: that of having the amount of damages reduced by proof of contributory negligence.

See also: *Norfolk Southern R. Co.* v. *Ferebee*, 238 U. S., 269, quoted in the opening statement of this brief.

VI.

The judgment in this case was the largest judgment in a death case ever approved by the Supreme Court of Louisiana, clearly showing the harmful effect of the errors complained of herein.

It should be remembered that the Supreme Court of Louisiana, upon an appeal, passes on questions of fact as well as of law (*Hosea's Widow* v. *Miles*, 13 La. R., 107, 110), and fixes the amount of damages, *increasing* or diminishing the amount of damages awarded by the jury in the trial court, if it thinks the amount should be increased or diminished.

> *Roby* v. *Kansas City Southern*, 130 La., 58 Sou., 696;
> *Hosea's Widow* v. *Miles*, 13 La. R., 107, 110;

Donnell v. *Sandford,* 11 La. Ann., 645;
Nation v. *Luddington,* 133 La., 657;
Strickland v. *Railroad,* 134 La., 238.

In this case the jury returned a verdict in favor of plaintiff for $17,500, apportioned as follows:

$5,000 in favor of the widow,
3,500 in favor of her seven-year old daughter,
4,000 in favor of her six-year old daughter, and
5,000 in favor of her two-year old boy.

And the Supreme Court affirmed a judgment for this amount.

An examination of plaintiff's petition (Rec., 4) shows that plaintiff sued for the support and maintenance of which the widow and children were deprived by the death of decedent. Paragraph 9 of the petition was stricken out, (see defendant's answer, Rec., 11) leaving only the allegation of damage contained in paragraph 10. See also amended and supplemental petition of plaintiff (Rec. 10).

In Louisiana a recovery is permitted for the pain and anguish of the survivors on account of the death of their decedent, also for the pain and suffering of decedent, in addition to the pecuniary loss of the beneficiaries on account of the death of decedent.

Plaintiff's right of recovery under the Federal Act is limited to loss of contributions, and no recovery can be had for grief, wounded feelings, loss of society, affection or companionship. There was no allegation nor proof of pecuniary loss through deprivation of care and attention of the deceased.

Railway Co. v. *Vreeland,* 227 U. S., 59;
Railway Co. v. *Didricksen,* 227 U. S., 145;
Railway Co. v. *McGinnis,* 228 U. S., 173.

There was no claim in this case of damages on account of pain and suffering of the deceased, under section 9 of the Federal Employers' Liability Act, and could be none, since plaintiff's decedent was instantly killed (Rec., 16).

This being true, the recovery in the present case should have been less than the amounts awarded by the Supreme Court of Louisiana in cases governed by the State law, where the earnings

and contributions of the deceased were as large as in the case at bar and his expectancy of life at least as great as in the case of plaintiff's decedent, since in the cases under the state law elements of damage are included which are not allowable under the Federal Act.

In the present case, however, instead of awarding less than was given in similar cases under the state law, the Supreme Court of Louisiana approved and allowed the largest amount that it had ever approved or allowed in a similar case.

In proof of this assertion, attention is called to the following cases decided by the Supreme Court of Louisiana where the elements of recovery were loss of support, mental pain and suffering of the survivors, and the amount which the deceased might have recovered had he survived the accident.

In 35 La., 609, the Supreme Court of Louisiana allowed to the wife and children of a decedent who lived and suffered twenty-four hours, the sum of $2,500.00.

In 117 La., 227, the Supreme Court of Louisana allowed the wife and children for the death of the husband and father, for all of the causes alleged, the sum of $3,000.00. Decedent was 22 years old and earning $9.00 per week.

In the case of *Robideaux* v. *Hebert*, 118 La., 1089, the Supreme Court of Louisiana allowed the widow and minor children of the deceased, for loss of support of the father and for mental pain and suffering, and also for what decedent might have recovered had he survived the accident, the sum of $4,000.00.

The largest amounts ever awarded by the Supreme Court of the State of Louisiana in a case involving the death of the husband and father was in the case of *Eichorn* v. *Ry. Co.*, 112 La., 236, and 114 La., 712. In the first case the widow alone rerovered a judgment of $10,000 and in the second case his seven minor children recovered $7,000. Eichorn was only 39 years of age, whereas the deceased here was 53 years old, the first having an expectancy of forty years, and the latter an expectancy of sixteen years. Eichorn was earning $3,000 per annum, and Jones was earning about $2,100.

In the Eichorn case the grounds of recovery were much broader and more comprehensive and the total amount allowed was $17,000, whereas in the present case, where the ground of

recovery is restricted to loss of support, the Supreme Court of Louisiana gives to the widow and children $500 more than it did in the Eichorn case, where there were seven children instead of three.

In the recent case of *Strickland* v. *Railroad Company*, 134 La., 238, the Supreme Court of Louisiana reduced a verdict in favor of the wife and children of the deceased to $12,000, just $5,500 less than it allows in the present case. Strickland was 46 years old and had a life expectancy of twenty-two years. It does not appear from the report of the case what amount he was earning.

In the case of *Nation* v. *Luddington*, 133 La., 657, it appears that the deceased was 38 years old and left a wife and three minor children, and the Supreme Court of the State of Louisiana increased the amount awarded to the sum of $10,000. But in this case, as in the others, recovery was permitted for the mental anguish of the wife and children, and likewise for such damages as the deceased might have recovered had he survived.

It therefore appears that, in the present case, the Supreme Court of Louisiana has approved a judgment for damages, for the death of a husband and father, larger than any judgment ever before approved by it. The opinion of the Supreme Court, in the case at bar, warrants the conclusion that this result was due not only to the erroneous exclusion of evidence of contributory negligence, but also to an erroneous interpretation and application of the Federal Act, by the Supreme Court, with reference to the measure of damages

VII.

The Supreme Court of Louisiana did not correctly interpret and apply the Federal Employers' Liability Act in the assessment of damages, and thereby deprived defendant of a right or immunity claimed under the act. This also presents a Federal question reviewable by this court.

In the original opinion of the state court (Rec., 57), no reference whatever was made to the elements of damage for which recovery might be had except the following:

> The evidence shows that Mr. Jones was 53 years of age at the time he was killed; was earning $175.00 per month; was sober and domestic in his habits and kind to his wife and children. The verdict is not excessive.

From this expression of the court it appears that it awarded the widow and children damages because decedent was a kind and affectionate husband and father, although no such elements of damage are allowable under the Federal Act, and none were attempted to be claimed in plaintiff's petition.

On the application for rehearing (Rec., 60), the court again referred to the amount of damages, saying:

> The learned counsel complained of the amount of the award and compared it with that awarded in the Eichorn cases in which a widow and children were given $17,000; but those cases were decided several years ago, and since then the purchasing power of money has decreased and the cost of living has increased in a ratio which more than accounts for the difference of $500 between those judgments and the judgment here rendered, even though, as suggested, the present judgment being governed by the Federal statute, allows nothing for any suffering of the deceased or for the mental anguish of the plaintiffs and though it includes nothing in the way of punitory damages.

In the above quotation, the court says nothing to justify a judgment for as large an amount as those awarded in similar cases under the State Law, although the State Law permits an allowance for elements of damages not allowable under the Federal Act, and, at the same time includes all the elements which can be considered under the Federal Act. In support of the allowance of an increased amount over the highest amount permitted under the State Law, the court says:

> The purchasing power of money has decreased and the cost of living has increased;

clearly indicating that the court took into consideration the supposed greater needs of the beneficiaries, due to the increased cost of living, although there was no testimony that the fact that the cost of living had increased would increase the amount of decedent's earnings, nor of his contributions to his family, and the beneficiaries' right of recovery should have been limited to their pecuniary loss.

Plaintiff testified (Rec., 17) as follows:

Q. Mrs. Jones, to live here in Shreveport and support your family in the manner in which you lived in Mr. Jones' time, about what would it take per month?

A. Takes one hundred dollars per month, sometimes a little over.

Q. That is living in the same manner you did in his time?

A. Yes, sir.

Q. Can you live on that amount now?

A. Yes, sir.

We submit that while the common carriers of the country should not unduly burden the Supreme Court of the United States with these cases arising under the Federal Employers' Liability Act, nevertheless, a very serious burden is being placed upon the commerce of the country by the failure of the state courts to apply, frankly, and ingenuously, the principles of the act with reference to the assessment of damages, and this court cannot only save labor to itself, but perform a very great service, by clearly defining and insisting upon a logical and consistent application of such principles. Every common carrier of which we have any knowledge endeavors to settle every personal injury case, even where the liability is doubtful, and the contests arise on account of the demand by the beneficiaries of amounts which are deemed to be excessive. It is a speculation in which the plaintiffs, at the present time, apparently have everything to gain and nothing to lose. In the present case, the plaintiff's decedent was 53 years of age at the time of his death. It was entirely unlikely that he would have continued to be employed as an engineer for the entire term of his life expectancy, which was 16 years, as alleged in plaintiff's petition (Rec., 4) The amount of his monthly contributions to his family, as testified to by his widow (Rec., 17) was about $100. This amount, without any discount on account of present payment, would, for the full term of his life expectancy, have amounted to $19,200; the amount awarded was $17,500.

At six per cent interest, a conservative rate in this section, this sum would have yielded $1050.00 per year, not much less

than the amount of decedent's contributions, leaving the principal sum unimpaired.

We submit that this amount was clearly excessive. We are aware that this court does not consider the mere question of excessiveness of verdicts, but we do submit that it is not only its right, but its duty, to look carefully to see that the courts apply the correct principles in the awarding of the damages, and that the opinion of the Supreme Court of Louisiana in the present case shows that it clearly committed error in the interpretation and application of the provisions of the Federal Employers' Liability Act, as construed by this court, in the assessment of damages. The amount of the judgment shows that defendant was damaged by such error, as well as by the Court's refusal to admit evidence of contributory negligence.

It is contended in plaintiff's brief that the questions relied on were not properly raised. The Supreme Court of Louisiana, however, considered and passed on the questions, which was sufficient, if there were anything in this contention of plaintiff, which we deny.

As the court said in *Miedreich* v. *Launstein*, 232 U. S., 236:

> Although the record is meager of attempts to raise it, if the state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this court regards the question as duly made.

In *San Jose L. & W. Co.* v. *San Jose Ranch Co.*, 189 U. S., 177; 23 Sup. Ct. Rep., 487, 489, this court said:

> Under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words "specially set up and claimed" that it was fully considered in the opinion of the court and ruled against the plaintiff in error. (Citing cases.)

In *Kaukauna Water Company* v. *Green*, 142 U. S., 254, this court said:

> If the adjudication of a Federal question is necessarily involved in a decision of the case, it is not necessary that it should appear affirmatively in the record or in the opinion of that court that such question was raised and decided.

See, also:

Tennessee v. *Davis*, 100 U. S., 357;
Union Pacific Ry. Co. v. *Myers*, 115 U. S., 1;
Kansas City Southern Ry. Co. v. *Albers*, 223 U. S., 591;
Mallet v. *North Carolina*, 181 U. S., 589, 21 Sup. Ct. Rep., 730.

The non-technical manner in which the Supreme Court of Louisiana considers matters involved in a case which comes before it on appeal, is shown by the following expression of that Court in the case of *Covington* v *Roberson*, 111 La., 338, 35 So., 586, 591:

> This case is submitted to us by defendant without any complaint as to the instructions which were given by the court to the jury, and the charge itself is not in the record. As has been usual since the passage of the statute allowing objections to testimony to be noted by the clerk or stenographer in the note of evidence to stand in lieu of a formal bill of exceptions, a great many such objections were made on both sides, but none have been particularly called to our attention.
>
> We are substantially left to decide the issues upon the weight and sufficiency of the evidence, and through the application by ourselves thereto of general principles of law bearing upon the subject-matter of slander.

We submit that for the above reasons, the judgment should be reversed.

Respectfully submitted,

S. W. MOORE,
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Attorneys for the Kansas City Southern Railway Company, Plaintiff in Error.

Office Supreme Court, U. S.
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No. 482.

In the

Supreme Court of the United States

October Term, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

MRS. NORA M. JONES, Administratrix.

MOTION TO DISMISS.

Counsel for the Appellee, Mrs. Nora M. Jones, Administratrix.

In the

Supreme Court of the United States

October Term, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. NORA M. JONES, Administratrix.

No. 492.

MOTION TO DISMISS.

Comes now the appellee herein, by Newton C. Blanchard, Leon R. Smith and Otis W. Bullock, her counsel, appearing in that behalf, and move the Court to dismiss the writ of error in the above entitled cause, or affirm the judgment of the court below, for the following reasons, to-wit:

Assignment of Error No. 1:

> "The court erred in holding that while evidence of contributory negligence on the part of the deceased was admissible to mitigate the amount of the damages to be

awarded by the jury, under the Act of Congress known as the Employers' Liability Act, that yet in order that such evidence might be admitted that it should be offered for that specific purpose and not tendered generally, contrary to said Act of Congress."

On the trial of this cause the fireman on the passenger train, Elmer Wood, was asked by counsel for plaintiff in error this question:

"Q. You did not have the train under control then?

Counsel for plaintiff objects to any evidence as to contributory negligence as the same is not alleged.

Objection sustained by the court.

To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of a formal bill of exceptions." (Tr. 25.)

The ruling of the trial judge is made the basis for the first three assignments of error. (Tr. 63.)

The Supreme Court of Louisiana in the instant case upheld the ruling of the trial judge, saying:

"The evidence was therefore offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded."

We submit when the offer of testimony includes that which is admissible with that which is not,

and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made.

Further, we contend that averments of a Federal question to give jurisdiction to the Honorable Supreme Court of the United States must be so distinct and positive as to place it beyond question that the party bringing the case up upon a writ of error from the state court intended to assert a Federal right.

It is, we contend, essential that the record should disclose, not only that the alleged right, privilege or immunity was specially set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed.

The bill of exceptions reserved by the plaintiff in error to the ruling of the trial judge did not contain any reference whatever to the Employers' Liability Act.

Assignment of Error No. 2:

> "The court erred in excluding evidence of the contributory negligence of the deceased tendered by the defendant, because it was not admissible generally, under the Act of Congress known as the Employers' Liability Act, and when offered was not restricted by defendant then and there for the purpose of mitigating the amount of damages to be awarded, contrary to said Act of Congress."

We submit that the established rule of the Federal courts is that contributory negligence to defeat recovery or to reduce recovery must directly and proximately contribute to the injury.

In the instant case the Supreme Court of Loiusiana said:

> "In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision, or that there was any negligence whatever on his part. The fireman testified, and it was not contradicted, that the train had slowed down and was under control."

We submit the Supreme Court of the United States upon a writ of error will not make inquiry whether there was error below in dealing with questions of fact.

With the findings upon the facts by the Supreme Court of Louisiana being final, it is apparent that the plaintiff in error could not have been prejudiced by the ruling of the trial judge, for the facts show there was no negligence on the part of the engineer, T. A. Jones, deceased, and in consequence the basis for the first three assignments of error by the plaintiff in error must fall.

We submit that the Honorable Supreme Court of the United States will learn from reading the opinion of the Louisiana Supreme Court, that

the Federal Safety Appliance Act was violated by the plaintiff in error (Railroad), and therefor the plea of contributory negligence was not available to it as a defense.

Assignment of Error No. 3:

> "The court erred in excluding evidence of the contributory negligence of the deceased which it held was admissible for the purpose of mitigating the damages to be awarded by holding that it must be restricted to that purpose and so tendered by the defendant, for the reason that under the Employers' Liability Act of Congress such evidence is admissible to mitigate the damages to be awarded and being so admissible it was the duty of the trial judge to instruct the jury that it should be considered by them in fixing the amount of damages to be awarded and should not be considered in determining the liability of the defendant, and it was not the duty of defendant under said Act of Congress to specifically limit the purpose or effect of such evidence at the time it was tendered, such limitation being fixed in the Act itself."

This assignment of error cannot be considered for there is no bill of exceptions in the record, complaining of the charge of the law made by the trial judge to the jury.

Errors committed by the trial judge, we submit, should be brought to his attention before the

retirement of the jury, so as to enable the judge to correct such error, if there be any.

Under the law of Louisiana the defense of contributory negligence, to be available, must be specially pleaded.

We submit that errors assigned upon the record, relating to matters of pleading and practice under the laws of the state, involve no Federal question.

Assignment of Error No. 4:

> "The court erred in denying to the defendant the right to remove said cause to the United States District Court for the Western District of Louisiana, for the reason that said suit was of a civil nature wholly between citizens of different states and involved, exclusive of interest and cost more than three thousand dollars, the right of removal being given to the defendant because of such diverse citizenship by the Constitution and laws of the United States and particularly by Section 2 of Act of Congress of March 3d, 1887, and the amendments thereto."

We submit that the issue here raised has been foreclosed by a recent decision of the Honorable Supreme Court of the United States, *viz., Kansas City Southern Railway Company, Plaintiff in Error,* v. *Sam E. Leslie, Admr.* (not yet reported). The court denied the right to remove,

under a state of facts in every way similar to those of the instant case.

Assignment of Error No. 5:

> "The court erred in awarding damages to the administratrix of the deceased without taking into consideration the elements for which damages are awarded under the Act of Congress, known as the Employers' Liability Act, approving and awarding her a sum in excess of that which it had allowed to others where the elements of recovery embraced not only loss of support as sued for in this case, but where the elements of recovery also embraced mental anguish, and a recovery for the death of the deceased, and the Supreme Court of the State of Louisiana by failing to give consideration to the elements of damages recoverable under said Act of Congress and by awarding a lump sum to each of the beneficiaries under said Act, dodged the Federal question thus presented and decided the same adversely to defendant, contrary to the terms and provisions of said Act of Congress, approved April 22d, 1908, amended April 5th, 1910."

This contention is wholly without merit, we submit, for there is no bill of exceptions in the record, nor is the charge of the trial judge reproduced in the record upon which to base such a contention.

The verdict of the jury approved by the trial judge is shown to have been rendered by the jury with discrimination, and upon its face it conforms

to the law apportioning the damages to the beneficiaries as laid down in decisions of the Honorable Supreme Court of the United States.

The *quantum* of damages awarded by verdicts in actions under the Employers' Liability Act does not present a question reviewable by the Honorable Supreme Court of the United States upon a writ of error.

The Supreme Court of Louisiana did not fix the award of damages in the instant case. The jury made the award and the Louisiana Supreme Court in reviewing the case permitted the verdict to stand, for it is the settled jurisprudence of Louisiana that the *quantum* of damages awarded by a jury in a case of personal injury will not be disturbed unless the award is manifestly excessive or inadequate.

The plaintiff in error asserts that the Louisiana Supreme Court failed to take into consideration the Employers' Liability Act in approving and awarding damages. That the award embraced not only the elements of loss of support, but the elements of mental anguish.

The exact reverse of this statement is true, for the Louisiana Supreme Court in its opinion refusing a rehearing said:

> "* * * the present judgment, being governed by the Federal statute, allows nothing for any suffering of the deceased, or for the mental anguish of the plaintiff, and

though it includes nothing in the way of punitory damages."

And the said appellee, by counsel as aforesaid, also move the Court to affirm said judgment or decree from which the said writ of error purports to have been taken, because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said writ of error was taken for delay only.

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Counsel for the Appellee, Mrs. Nora M. Jones, Administratrix.

Office Supreme Court, U. S.
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No. 492.

In the

Supreme Court of the United States

October Term, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. NORA M. JONES, Administratrix of the Succession of T. A. Jones, Deceased.

In Error to the Supreme Court of the State of Louisiana.

BRIEF OF COUNSEL FOR APPELLEE, AND DEFENDANT IN ERROR, MRS. NORA M. JONES, ADMINISTRATRIX.

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In the

Supreme Court of the United States

October Term, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. NORA M. JONES, Administratrix of the Succession of T. A. Jones, Deceased.

In Error to the Supreme Court of the State of Louisiana.

No. 492.

BRIEF OF COUNSEL FOR APPELLEE, AND DEFENDANT IN ERROR, MRS. NORA M. JONES, ADMINISTRATRIX.

We have set forth in the following pages of this brief the several assignments of error set up by the plaintiff in error, and to each assignment of error we have given reasons and authority which we submit shows that the writ sued out in this cause was manifestly for the purpose of delay.

Assignment of Error No. 1:

> **"The court erred in holding that while evidence of contributory negligence on the part of the deceased was admissible to mitigate the amount of the damages to be awarded by the jury, under the Act of Congress known as the Employers' Liability Act, that yet in order that such evidence might be admitted that it should be offered for that specific purpose and not tendered generally, contrary to said Act of Congress."**

On the trial of the case the fireman on the passenger train, Elmer Wood, was asked by counsel for plaintiff in error this question:

"Q. You did not have the train under control then?

Counsel for plaintiff (now defendant in error) objects to any evidence as to contributory negligence, as same is not alleged.

Objection sustained by the court.

To which ruling of the court counsel for defendant (now plaintiff in error) excepts and asks that this note stand in lieu of a formal bill of exception." (Tr. 25.)

Counsel for plaintiff in error in the trial court contented themselves with merely reserving a bill of exceptions, generally, to the ruling of the trial judge.

The counsel for plaintiff in error did not direct the attention of the trial judge to any specific reasons for the admission of the evidence sought by the question asked.

When objection was interposed by counsel for defendant in error, there was no attempt made by

the counsel for plaintiff in error to show the evidence was admissible.

In the trial of cases, under the Louisiana practice, such general objections are often made to evidence, and are passed upon at once by the trial judge, with a reservation of a bill of exceptions by the aggrieved counsel noted by the court stenographer in the notes of evidence, and the trial proceeds.

Such incidents are numerously recorded during each trial in the notes of the court stenographer.

Unless the attention of the trial judge is called to a specific objection or assignment of error, little or no attention is paid to these general objections.

The Louisiana Supreme Court in the case of *Covington* v. *Roberson*, 111 La. 338, said:

> "This case is submitted to us by defendant without any complaint as to the instructions which were given by the court to the jury, and the charge itself is not in the record. As has been usual since the passage of the statute allowing objections to testimony to be noted by the clerk or stenographer in the note of evidence to stand in lieu of a formal bill of exceptions, a great many such objections were made on both sides, but none have been particularly called to our attention. We are substantially left to decide the issues upon the weight and sufficiency of evidence, and through the application by ourselves thereto of general *principles* of law. * * *"

The Louisiana Supreme Court in its opinion refusing the application for a rehearing in the instant case said:

"The evidence was therefore offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded."

"The rule that the objection should be specific has no application, however, where a general objection is sustained; in that case, the party against whom the ruling was made cannot urge that the objection was too general. And when the offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made."

Jones Com. on Ev., Sec. 894, Vol. 5, p. 377 (Blue Book).

In *Mutual Life Ins. Co. of N. Y.* v. *McGrew*, 188 U. S. 308, 47 Law Ed. 484, the court said:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Section 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that in order to maintain it the right, title, privilege or immunity relied on must not be specially set up or claimed, but at the proper time and in the proper way. The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised. *Spies*

v. *Illinois*, 123 U. S. 131; *Jacobi* v. *Alabama*, 187 U. S. 133; *Layton* v. *Missouri*, 187 U. S."

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record showing that the claim was presented to the court. *Loeb* v. *Columbia Twp.*, 179 U. S. 472. * * *"

"The assertion of the right must be made unmistakably, and not left to mere inference. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648."

See *Michigan Sugar Co.* v. *Dix*, 185 U. S. 112:

"Averments of a federal question to give jurisdiction to this court to review a state judgment must be so distinct and positive as to place it beyond question that the party bringing the case here from the state court intended to assert a federal right."

F. G. Oxley State Co. v. *Butler County*, 166 U. S. 648, 41 Law Ed. 1149.

"Excepting generally to an entire instruction which embodies several propositions of law, to some of which no objection properly can be taken, does not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein."

Norfolk & W. R. Co. v. *Earnest*, 229 U. S. 114, 57 Law Ed. 1096.

"Questions not properly presented by the record, and not resulting by necessary intendment therefrom, will not be reviewed."

Citizens Sav. Bank v. *Owensboro,* 173 U. S. 636, 43 Law Ed. 840.

"* * * It is essential that the record should disclose not only that the alleged right, privilege or immunity was specially set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed."

Clark v. *Commonwealth of Penn.*, 128 U. S. 395.

In *Seaboard A. L. R. Co.* v. *Duvall,* 225 U. S. 488, 56 Law Ed. 1176, the court said:

"* * * In any event the exception did not raise any specific question as to the proper construction of the Act under which this action had been brought."

The syllabus of the case of *Seaboard Air Line Ry. Co.* v. *Duvall,* 225 U. S. 477, 56 Law Ed. 1171, reads:

"To sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state on the ground that there was set up and denied a right privilege or immunity claimed under a federal statute, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the Act so directly involved that the state court could not have

given the judgment it did without deciding against the contention of the plaintiff in error."

"Where no sufficient exception is taken to a ruling of the court, it will not be passed upon."

Benson v. *United States*, 146 U. S. 325, 36 Law Ed. 991.

In *Seaboard A. L. R. Co.* v. *Duvall*, 225 U. S. 477, 56 Law Ed. 1171, the court in its opinion says:

"Not one of the requests asks any definite construction of any part of the Employers' Liability Act, or indeed, contains any reference whatever to the Act."

"A claim that the admission in evidence of the previous testimony of an absent witness was in violation of the 14th amendment to the Federal Constitution was not specifically set up at the proper time and in the proper way to confer jurisdiction on the Supreme Court of the United States to review the judgment of the highest court of a state, by an assignment of error in that court, which was not considered by it presumably because no such question had been raised in the trial court."

Sanford Jacobi v. *State of Alabama*, 187 U. S. 133, 47 Law Ed. 106.

"So long, then, as the offer included evidence incompetent, coupled with that which may have been competent, the court commit-

ted no error in excluding the offer in its entirety. It was not the duty of the court to separate the competent from the incompetent matter, and admit the one and exclude the other. It properly passed upon the offer as made, and was not required to do for counsel that which he should have done for himself. *Yoder* v. *Reynolds*, 28 Mont. 183, 72 Pac. 417; *Clark* v. *Ryan*, 95 Ala. 406, 11 So. 22; *First Nat. Bk.* v. *North*, 2 S. D. 480, 51 N. W. 96; Thomp. Trials 678."

Farleigh v. *Kelley*, 28 Mont. 421, 63 L. R. A. 325.

"Defendant should have requested an instruction telling the jury not to consider certain evidence offered on the issue of damages: merely excepting to the court's allowing them to consider it was not sufficient."

Lafferty v. *Third Ave. R. Co.*, 176 N. Y. 594, 68 N. E. 1118.

"It is not error to exclude evidence, admissible for one purpose, when offered for another specific purpose for which it is admissible."

Jeffersonville, M. & I. R. Co. v. *Riley*, 39 Ind. 568.

Hart v. *Brierley*, 189 Mass. 598, 76 N. E. 286.

Hamburg v. *St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. 388.

Howard v. *Vaughan-Moning Shoe Co.*, 82 Mo. App. 405.

Root v. *Incorporated Village of Monroeville,* 10 Ohio Cir. Ct. R. 617.
Stickney v. *Hughes,* 12 Wyo. 397, 75 P. 945, 79 P. 922.

"And if a party mingles competent and incompetent testimony, proposing it all together, the court will not be required to separate the good from the bad, but may reject the entire offer. *Cuthrell* v. *Cuthrell,* 101 Ind. 375; *Sohn* v. *Jervis,* 101 Ind. 578; *City of Terre Haute* v. *Hudnut,* 112 Ind. 542."

Vurpittal et al. v. *Zehner et al.* (Ind.), 28 N. E. 556.
Railway Co. v. *Hendricks,* 48 Ark. 177, 2 S. W. 783.
Shewalter v. *Bergman* (Ind.), 28 N. E. 686.

"When admissible evidence is intermingled with that which is inadmissible, it is not error to exclude the whole."

Cole v. *Horton* (Tex.), 61 S. W. 503.

"Where a tender of evidence is made to prove certain facts, some of which are admissible and others inadmissible, the offer is properly rejected as a whole."

First Nat. Bk. v. *North* (S. D.), 51 N. W. 96.

"An objection is properly sustained to an offer to prove that the witness told defendant certain facts, the communication of some of

which was incompetent, it being the duty of counsel, and not of the court, to separate the competent from the incompetent."

Over v. *Schiffling* (Ind.), 26 N. E. 91.

"The rejection of evidence on a general objection will not call for reversal, where the evidence was objectionable on any specific ground, though the trial court may as against a general objection receive evidence competent as against a general objection, though objectionable as against a specific objection."

Rosenberg et al. v. *Sheahan et al.* (Wis.), 133 N. W. 645.
Clark v. *Ryan* (Ala.), 11 So. 22.

"Generally, in order to predicate error on the overruling of an objection to testimony, specific ground of objection must have been brought to the attention of the trial court prior to the ruling. But, where a general objection to evidence is sustained, the party against whom the ruling was made cannot urge as a ground of reversal that the objection was not specific."

Hurlbut v. *Hall* (Neb.), 58 N. W. 538.
Int. Harvester Co. v. *McKeever*, 109 N. W. 642.

"While the trial court was not bound to seek grounds for excluding evidence upon a general objection thereto, if it did so, and

found a valid objection, the person offering it cannot complain."

Adams v. *Southern Ry. Co.* (Ala.), 50 So. Rep. 987.

"If the exclusion of certain evidence is proper on any ground, the cause will not be reversed because the objection to it was not sufficiently definite, unless the objection not urged might have been obviated."

Spottswood v. *Weir et al.* (Cal.), 22 Pac. 289.

Assignment of Error No. 2:

"The court erred in excluding evidence of the contributory negligence of the deceased tendered by the defendant because it was not admissible generally, under the Act of Congress known as the Employers' Liability Act, and when offered was not restricted by defendant then and there for the purpose of mitigating the amount of damages to be awarded, contrary to said Act of Congress."

The established rule of the federal courts is that contributory negligence to defeat recovery or to reduce recovery must directly and proximately contribute to the injury.

On the question of negligence the Louisiana Supreme Court in the instant case shows how frivolous is the contention of the plaintiff in error under this assignment of error, for it said:

"In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision, or

> that there was any negligence whatever on his part. The fireman testified, and it was not contradicted, that the train had slowed down and was under control."

As the Supreme Court of the United States upon a writ of error will not make inquiry whether there was error below in dealing with questions of fact, the statement of fact above excerpted must be accepted as true.

> "Only questions of law apparent on the record can be considered by the Supreme Court of the United States on a writ of error, and there can be no inquiry whether there was error below in dealing with questions of fact."
>
> *Behn M. & Co.* v. *Campbell*, 205 U. S. 403. 51 Law Ed. 857.

The bill of exceptions reserved by the plaintiff in error does not disclose that any alleged right, privilege or immunity, or federal question was set up in the trial court, nor that the decision of the court was against any such contention.

We reproduce the question asked by the counsel for plaintiff in error and the bill of exception reserved by such counsel to the ruling of the trial judge in sustaining an objection made by counsel for defendant in error:

> "Q. You did not have the train under control, then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence, as same is not alleged.
>
> Objection sustained by the court.

> "To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of a formal bill of exceptions." (Tr. 25.)

The Louisiana Supreme Court in its decision of the instant case said:

> "The plaintiff charges negligence on the part of the defendant Company and its employees in that the runaway car was known by them to be out of repair and not equipped with the safety appliances required by law and necessary to control it. * * *"

In the court's recital of the facts of the case it referred to the runaway car as follows:

> "This Rock Island car was tagged for repairs: 'Draft bolts and draft timbers spread. End knocked out.' It had to be taken to the transfer track and unloaded, in order to be repaired. Hence it seems that it was necessary to put the Rock Island car at the north end of the four empties and have the switch engine at the opposite end of them. The engineer pulled the Rock Island car out of the repair switch, backed it up to the four empties, and, believing it had coupled automatically, ordered the brakeman to put a chock under its wheels, and apply the hand brakes. Then he took the engine back into the repair track, ordered the switchman to remove the chock, release the hand brakes, and let the five cars roll down past the engine. The testimony of the switchman furnishes a graphic description of the operations and the resulting runaway. * * *"

The court in stating its conclusion upon the evidence relative to the defective coupler and brake said:

> "The only evidence offered by the defendant, besides that elicited on cross-examination, was the testimony of the switchman who had climbed upon the runaway car and tried to stop it. After he had testified as a witness for the plaintiff, he was recalled by the defendant's counsel to prove that, when the car got away it was being taken from the repair track to the transfer track to be there unloaded and returned to the repair track to be repaired. He also testified that the car seemed to couple when it was butted against the four empties, and the brakes seemed to hold. It appears, however, that this witness was not a mechanic; and in view of the fact that the wheels of this car had to be chocked when it was supposed to be coupled to four other cars with brakes on, and in view of the proof that the coupling and brakes both failed to work, we do not think it has been proven that the defects in the car did not affect its couplings or brakes. It is highly improbable that the defects in the car and the failure of its coupling and brakes to be any service were mere coincidences."

The "Safety Appliance Act" was violated by the movement of a car with defective brakes and coupler.

Oneal, a switchman in the employ of the defendant Railroad testified:

> "Q. Mr. Oneal, what was the matter with this car? A. The brakes would not apply.
> Q. Brakes would not apply? A. No, sir. (Tr. 30.)

Q. The Rock Island car was the car on the north end? A. Yes, sir, and I hollered to Andrews—I says, 'Dick, the cars have separated.' He says, 'Get down and try to check it up.' We had then about five or six hundred feet from there to the old street car crossing and I ran along on the ground and caught this car, expecting to stop it. I got on there then and it was going down about a two per cent grade and the brakes did not seem to apply. The fire seemed to fly from the wheels." * * * (Tr. 31.)

E. M. Carlton, switch engineer for the defendant Railroad at the time of the accident and also at the time of the trial, testified:

"Q. If you turn a freight car loose, and it is running of its own momentum, don't they stop them with the hand brake? A. Yes, sir.

Q. If the brakes are in good order they would stop a car? A. Yes, sir." (Tr. 38-39.)

On page 14 of the transcript there is a letter filed in evidence over the signature of G. R. Parish, that admits on the part of the defendant Railroad its negligence as to the defective brake. It reads as follows:

"Shops, Jan. 10, 1912.

Mr. R. D. Andrews,
Foreman, Shops. File 124.

Dear Sir:

Referring to accident train No. 3, just south Cross Lake bridge, night of November 6th.

A reprimand has been placed against your record for responsibility and failure to be a brake on car that broke off, which would have placed you in a better position to take care of the situation, and possibly in position to have overcome this trouble.

Yours truly,

C. R. PARISH,
G. Y. M."

The evidence pertinent to this assignment of error is undisputed that the brake on the car would not perform its function. Again from the evidence the Supreme Court of Louisiana held that the plaintiff in error, the Kansas City Southern Railway Company, had failed to overcome the evidence in the record to the effect that both the brake and the coupler on the runaway car were defective.

The defenses of assumption of risk and contributory negligence are not available to a common carrier, if such common carrier has violated any statute enacted for the safety of employees, and such violation has contributed to the death or injury of such employee.

The Safety Appliance Act has an important bearing upon the Employers' Liability Act, when its provisions are violated by a common carrier, and such violation contributes to the injury or death of the employee.

Under such circumstances the defenses of contributory negligence in mitigation of damages, and the defense of assumption of risk are denied the offending carrier.

The Federal Employers' Liability Act provides:

> "SECTION 3: In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.
>
> SECTION 4: In any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 2 of the Federal Safety Appliance Act provides:

> "On and after January 1, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling auto-

matically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The amendment of 1910 to Federal Safety Appliance Act of 1893, Section 2, reads:

"* * * All cars must be equipped with secure sill steps and efficient hand brakes * * *."

The Supreme Court of Louisiana thus states and answers the contention of the plaintiff in error under this assignment of errors.

On cross-examination of the fireman of the engine on the passenger train, the defendant's counsel asked him:

"'You did not have the passenger train under control?'"

"To which the plaintiff's counsel objected on the ground that the defendant had not alleged that there had been contributory negligence on the part of the engineer. The objection was sustained, and, on plaintiff's counsel's request, it was ordered that it should apply to all such evidence."

"The defendant's counsel reserved a bill of exceptions, and insists that there was error in the ruling."

"Section 3 of the Employers' Liability Act provides (then follows the section quoted in full)."

"The plea of contributory negligence, therefore, has been abolished by the Federal statute, as a defense. But counsel for the defendant contend that contributory negligence may be shown without pleading it, in

mitigation of the damage, on the theory that any facts, not alleged by the defendant, may be proven to show less damages than are claimed by the plaintiff.

This doctrine, supported by decisions in other jurisdictions, has no application to this case * * *. In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision, or that there was any negligence whatever on his part. The fireman testified, and it was not contradicted, that the train had slowed down and was under control."

We submit that the Louisiana Supreme Court found from its review of the evidence in this case that the Federal Safety Appliance Act had been violated. That both the coupler and brake on the runaway car were defective, and that under the Federal Employers' Liability Act, under which this suit was brought, the defense of contributory negligence was not available to the plaintiff in error, the Kansas City Southern Railway Company.

As the Honorable Supreme Court of the United States will not review the findings of the Supreme Court of Louisiana on mere questions of fact, where the consideration of such facts have nothing to do with any Federal question, we submit the Court is without jurisdiction to further consider the contention made by the plaintiff in error under this assignment of error.

"But we have not the power to correct mere errors in the trials in state courts,

although affirmed by the highest state courts. This court is not a general court of appeals, with the general right to review the decisions of state courts. We may only inquire whether there has been error committed in the decision of those Federal questions which are set forth in §709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), * * *."

St. Louis, I. M. & S. R. Co. v. *Taylor*, 210 U. S. 291, 52 Law 1066.

"The evidence will be analyzed by the Federal Supreme Court on a writ of error to a state court to the extent necessary to give the plaintiff in error the benefit of its asserted Federal right."

N. C. Ry. Co. v. *Zachary*, 232 U. S. 248.

Assignment of Error No. 3:

"The court erred in excluding evidence of the contributory negligence of the deceased which it held was admissible for the purpose of mitigating the damages to be awarded by holding that it must be restricted to that purpose and so tendered by the defendant, for the reason that under the Employers' Liability Act of Congress such evidence is admissible to mitigate the damages to be awarded, and being so admissible it was the duty of the trial judge to instruct the jury that it should be considered by them in fixing the amount of damages to be awarded and should not be considered in determining the liability of the defendant, and it was the duty of defendant under said Act of Congress to specially limit the purpose or effect of such evidence at the time it was tendered, such limitation being fixed in the Act itself."

This assignment of error, we submit, is frivolous. The charge of the trial judge to the jury was evidently satisfactory to the counsel for the plaintiff in error, for its astute counsel took no bills of exception to the charge.

The Court will assume that the trial judge correctly charged the law to the jury in the absence of the charge from the record, and without any bills of exception having been taken to the charge.

> "If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point; if he does not, it is a waiver of it."
>
> *Pennock* v. *Dialogue*, 2 Pet. (U. S.) 1, 15, 7 Law Ed. 327.

> "Errors not excepted to on trial will not be considered on appeal."
>
> *Hanna* v. *Maas*, 122 U. S. 24, 30 Law Ed. 1117.

> "The power of this court is confined to exceptions actually taken at the trial. Objection must be made and exception taken before the verdict."
>
> *Phelps* v. *Mayer*, 15 How. 160, 14 Law Ed. 643.

> "Exceptions to instructions must be brought to the attention of the court before the retirement of the jury, so as to enable

the judge to correct error, if there be any, in his instructions to them."

Hickory v. *United States,* 151 U. S. 303, 38 Law Ed. 170.

In *Doe* v. *Watson,* 8 Howard, 12 Law Ed. 1076, the court said:

"In the argument here, the counsel for the plaintiff asks the reversal of the judgment on the ground that the instruction was against the right of the lessors, or any part of them, to recover, although proved to be the heirs at law of John and Sarah Parrock. The attention of the Circuit Court was not drawn to this point, no instruction was asked in regard to it, and it cannot now be made. * * *"

The Supreme Court of Louisiana in the case of *Succession of Hasling,* 106 La. 553, said:

"* * * But if he expects, upon the appeal, to rely upon a special defense, he must have it appear upon the record. * * *"

In the case of *Wimbish* v. *Hamilton,* 47 A. 251, the court said:

"* * * As a matter of course the refusal to charge all of the instructions carried with it a refusal to charge any one of them, but if plaintiff had reason to complain of the refusal to give one of the special charges asked, he should have made such special charge the subject of a special tender of it, and reserved a separate bill."

The decision in *Jones* v. *Kansas City Southern Ry. Co.*, 137 La. —, was handed down on April 12, 1915. The defendant railway company applied for a rehearing, which was refused on May 10, 1915.

The Louisiana Supreme Court in refusing the rehearing thus states the contention of the defendant railway company:

> "Defendant's counsel contend that evidence of contributory negligence, on the part of the decedent, though not pleaded, and inadmissible to defeat recovery, should have been admitted for the mitigation of the damages claimed by the plaintiff; and, upon reconsideration, we are inclined to the opinion that it should have been admitted, if offered for that purpose, but it was not so offered.
>
> The record showing the following, upon the cross-examination, by defendant's counsel, of the fireman of the passenger train, to-wit:
>
> 'Q. You did not have the train under control, then?
>
> (Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged. Objection sustained by the court. To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions. Counsel for plaintiff asks that this objection and ruling and bill of exception be made general, to apply to all such evidence; and it is so ordered.)'
>
> The evidence was therefore offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded."

We submit that the contention of the plaintiff in error does not raise any specific question as to the proper construction of the Federal Employers' Liability Act, under which the instant suit was brought, or is any Federal question involved, but merely a matter of pleading and practice under the laws of the state of Louisiana.

We submit the Honorable Supreme Court of the United States is therefore without jurisdiction as to this assignment of error.

> "In order to sustain a writ of error from the Supreme Court of the United States to the highest court of a state in any action under the Federal Employers' Liability Act, it must appear, in order to give the United States Supreme Court jurisdiction, that a right under the Constitution or laws of the United States was specially set up by the plaintiff in error in the state court and denied by the highest court of the state. *It must also appear from the record that there was necessarily presented in the state court a definite issue as to the correct construction of the Federal Employers' Liability Act so directly involved that the state court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error.*"
>
> Roberts Injuries, Interstate Employees, §131, p. 239, citing the following authorities:
>
> *St. Louis, I. M. & S. R. Co.* v. *Taylor,* 210 U. S. 281, 52 Law Ed. 1061.
>
> *Seaboard A. L. Ry.* v. *Duvall,* 225 U. S. 477, 56 Law Ed. 1171.

"Errors assigned upon the record, relating to matters of pleading and practice under the laws of the state, involve no Federal question."

Buena Vista County v. *Iowa Falls, etc., R. R. Co.*, 112 U. S. 165, 28 Law Ed. 681.

"In 1908, after the case had been twice tried without any decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the state, it is not subject to review by us. *Texas & N. O. R. Co.* v. *Miller*, 221 U. S. 408, 416, 55 Law Ed. 789, 31 Sup. Ct. Rep. 534."

Brinkmeier v. *Missouri P. R. Co.*, 224 U. S. 268, 56 Law Ed. 758.

Questions merely of state practice are not reviewable on writ of error from the Federal Supreme Court to a state court.

Buena Vista County v. *Iowa Falls & S. C. R. Co.*, 112 U. S. 165, 28 Law Ed. 480.

Renaud v. *Abbott*, 116 U. S. 277, 29 Law Ed. 629.

Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685, 41 Law Ed. 1165.

Scranton v. *Wheeler*, 179 U. S. 141, 45 Law Ed. 126.

Such are questions of evidence.

Central P. R. Co. v. *California,* 162 U. S. 91, 40 Law Ed. 903.
Martin v. *Marks,* 97 U. S. 345, 24 Law Ed. 940.
Williams v. *Norris,* 12 Wheat. 117, 6 Law Ed. 571.

Questions of pleading, when considered solely as questions of state practice, are also outside the scope of such review.

National Foundry & Pipe Works v. *Oconto City Water Supply Co.,* 183 U. S. 216, 46 Law Ed. 157.
Grand Rapides & I. R. Co. v. *Butler,* 159 U. S. 87, 40 Law Ed. 85.
Johnson v. *Drew,* 171 U. S. 93, 43 Law Ed. 88.

In *Illinois Cent. R. Co.* v. *Porter,* 207 F. 316, the Circuit Court of Appeals, Sixth Circuit, said:

> "The charge of the jury is criticised as limiting the reduction of damages attributable to the negligence of the deceased to such negligence as proximately contributed to the injury. It is said that under the practice in Tennessee in cases where the contributory negligence does not defeat recovery, but merely reduces damages, any negligence of the person injured whichever remotely contributes to the injury is to be taken into account. We need not stop to consider the scope of the Tennessee decisions invoked. They are not binding upon our construction of this Federal statute. It is the established rule in the Federal courts that contributory

negligence, to defeat recovery, must directly and proximately contribute to the injury. We content ourselves with calling attention to the decisions of this court in *Coney Island* v. *Dennan,* 149 Fed. 687, 693, 79 C. C. A. 375, and *Toledo, St. Louis & Western R. Co.* v. *Kountz,* 168 Fed. 832, 840, 94 C. C. A. 244. We see no logical reason for a different view under the Employers' Liability Act. Under that Act the negligence of the employee must, in order to reduce recovery, be 'casual.' The purpose of the rule of damages provided is, as said by Mr. Justice Van Devanter, in the recent case of *Norfolk & Western Ry. Co.* v. *Earnest,* 229 U. S. 114, 57 Law Ed. 1096: 'To abrogate the common-law rule completely exonerating the carrier from liability in such a case, and substitute a new rule confining the exoneration to a proportionate part of the damage corresponding to the amount of negligence attributable to the employee.'

In the Earnest case it was pointed out that a comparison of the employee's negligence should be made, not with that of the defendant, but with 'the entire negligence attributable to both.' * * *"

"The question whether contributory negligence of the injured employee in order to be available to the defendant must be pleaded is to be determined by the laws of the state where the action is pending, for such a matter relates to procedure and the laws of the state govern as to procedure even in actions under the Federal Employers' Liability Act. The general rule is that unless the plaintiff's contributory negligence appears as a matter

of law by his proof the plea of contributory negligence must be specially pleaded; though a few courts hold to the contrary. * * *"

Roberts Injuries, Interstate Employees, §119, p. 226.

"In an action in a Federal court, brought in a state where the common law system of pleading prevails, contributory negligence, being in those courts a matter of affirmative defense, must be pleaded."

Clark v. *Canadian Pac. Ry. Co.*, 69 Fed. 543.

Evans v. *Lake Erie & W. R. Co.*, 78 Fed. 782.

"The adjudications of the Supreme Court, to the effect that the contributory negligence of a plaintiff is a matter of defense, and the burden of proof is upon the defendant, do not touch the question of pleading which arises here. That question is controlled by the rules which obtain in the state in which the action is tried, and in some of the states, under the code system of pleadings which prevails, the defendant may be required to specifically allege the defense in cases in which the complaint does not allege that the plaintiff was free from negligence on his part. As in Vermont the rules of pleading which obtain are those of the common law, and under these rules a defendant, in an action upon a case, is permitted, under a general traverse, to show that the plaintiff's negligence contributed to the injury, we are unable to doubt that the defendant in the

present case was entitled to avail himself of the defense, and that the instruction to the jury which is complained of by the assignments of error was erroneous."

Canadian Pac. Ry. Co. v. *Clark*, 73 Fed. 81, C. C. A. 447.

A case arising under the Employers' Liability Act was before the court in the case *New York, N. H. & H. R. Co.* v. *Vizvari*, 126 C. C. A. 632, 210 Fed. 118, in which the court said:

"* * * The defendant did not plead assumption of risk, but it relied upon it at the trial, and the court left it to the jury to say whether the plaintiff assumed the risk of the use of the chisel. In considering the necessity and sufficiency of the pleas of assumed risk, it is necessary to observe that a difference exists between the assumption of the 'ordinary' risks of the employment and the assumption of 'extraordinary' risks. If the risk is of the former kind, it is not incumbent on the defendant to plead it; but, if the risk is of the latter kind, the rule in some jurisdictions is that, if the defendant desires to rely upon it as a defense, he must specially plead it. See Labatt on Master & Servant, Vol. 4, §1636; 3 Bailey, Personal Injuries, 2d Ed., §851. But in this court the question is controlled by the rules which obtain in the state in which the action is tried. *Canadian P. R. Co.* v. *Clark*, 20 C. C. A. 447, 73 Fed. 76."

The new work of "Thornton's Federal Employers' Liability Act" (3d Ed.) thus states the law:

> "If the practice in the local state courts requires a particular defense to be presented by answer, it must be so presented in an action on the Federal Act. That is true where assumption of risk must be especially pleaded according to the local practice. But if the local practice does not require a plea or answer to raise the question, then in an action under the Federal Act it may be raised without pleading it. If the local practice requires contributory negligence to be pleaded in actions of negligence, then it must be pleaded in an action on the Federal statute, not as a full defense, but a defense as to the amount of damages recoverable, and the defendant, whether pleaded or not, has the burden to show it. * * *"
>
> Thornton's Federal Employers' Liability Act (3d Ed.), §209, page 311.

LAW OF LOUISIANA.

Under the law of Louisiana, contributory negligence must be specially pleaded to be *available* as a defense.

With great respect we submit that the *obiter dictum*, in the refusal by the Louisiana Supreme Court of the rehearing in this case, does not correctly set forth the well recognized jurisprudence of the state of Louisiana. We quote as follows:

> "Defendant's counsel contend that evidence of contributory negligence, on the part of the decedent, though not pleaded, and inadmis-

> sible to defeat recovery, should have been admitted for the mitigation of the damages claimed by the plaintiff; *and upon reconsideration, we are inclined to the opinion that it should have been admitted, if offered for that purpose; but it was not so offered.*"

Justice O'Neill in his dissenting opinion said:

> "I am yet of the opinion that evidence of contributory negligence is not admissible without a plea to that effect * * *."

We cite two very recent cases where the Supreme Court of Louisiana has decided the exact issue, holding that the evidence of contributory negligence is not available without a plea to that effect.

In *Buechner* v. *City of New Orleans*, 112 La. 599, the court said:

> "Our opinion is that contributory negligence must be pleaded by defendant, and, in the absence of such plea, evidence is not admissible to show that plaintiff was guilty of negligence."

Excerpting from the case cited *supra*, the Louisiana Supreme Court thus states the law:

> "The question raised by this bill is one of great importance and the decisions on the subject are confusing, conflicting and unsatisfactory. The weight of the more recent decisions is in favor of the proposition that 'contributory negligence is a matter of defense, and, to be availed of, must be pleaded.' See Rapalje & Mack's Digest, Vol. 3, Nos. 75, 76, page 281; Beach, *infra*.

It has been the uniform jurisprudence of the Supreme Court of the United States that the burden of proof is on defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury. See *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551, 11 Sup. Ct. 653, 35 Law Ed. 270; *Washington & Georgetown R. Co.* v. *Harmon's Adm'r,* 147 U. S. 571, 13 Sup. Ct. 557, 37 Law Ed. 284.

If this be a correct proposition of law, it follows that defendant must plead what he is bound to prove. What a party does not allege he cannot prove. Hennen's Digest, Vol. 2, p. 115, No. 3.

Beach states that the rule adopted by the United States Supreme Court prevails in England, and twenty states of the Union, and that defendant, under this rule, must allege and prove the concurrent default of plaintiff. Cont. Neg., §440-443."

In the case of *Roff* v. *Summit Lumber Co.,* 119 La. 577, the court said:

"Assumption of risk, like the plea of contributory negligence, must be specially urged, and cannot be availed of under the general issue. * * *"

The great weight of opinion supports the rule that the defense of contributory negligence, to be available, must be pleaded.

"It is a general rule that the defense of contributory negligence, to be available, must be pleaded."

Labatt's Master & Servant (2d Ed.), §1635, p. 4986. (Citing numerous authorities.)

> "While it is held in a number of jurisdictions that contributory negligence is available as a defense under the general issues, or general denial, it is held in the majority of jurisdictions where the question has been raised that to be available as a defense, contributory negligence must be specially pleaded, and it has been held that the rule applies, although the complaint alleges that plaintiff was free from fault."
>
> 29 "Cyc." 580-581.

In a comprehensive note to the case of *Okla. City* v. *Reed*, 17 Okla. 518, 33 L. R. A. (N. S.) 1205, the able editors say:

> "It has been held in a number of cases, in jurisdictions where the burden of proving contributory negligence is on the defendant, that if the defense is relied upon, it must be pleaded by the defendant; that it is not available under a general denial. * * *"

In a note to *Mellon* v. *Great Northern R. Co.*, 116 Minn. 449, Ann. Cas. 1913 B., p. 845, the able editor of that recent work says:

> "As to whether contributory negligence must be pleaded in order to be available as a defense, the decisions are conflicting. In many jurisdictions the rule is that contributory negligence must be specially pleaded, while in other jurisdictions such defense is available under the general issue. * * * Most of the recent cases involving the question have been decided in jurisdictions where

> the rule prevails, that contributory negligence is an affirmative defense and must be pleaded specially. * * *"

In a note to *Sissel* v. *St. Louis, etc., R. Co.*, 214 Mo. 515, 15 Am. & Eng. Ann. Cas. 433, the cases are shown which hold the view that contributory negligence must be pleaded, and also the cases holding the other view. The great weight of authority supports the view that contributory negligence to be availed of as a defense must be specially pleaded.

> "In an action to recover for injuries by being run over by a street car, contributory negligence of the person injured is a defense to be proved by the defendant."
>
> *Wash. & Georgetown R. R. Co.* v. *Gladmon*, 82 U. S. 401, 21 Law Ed. 114.
> *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291, 23 Law Ed. 898.

Assignment of Error No. 4:

> **"The court erred in denying to the defendant the right to remove said cause to the United States District Court for the Western District of Louisiana, for the reason that said suit was of a civil nature wholly between citizens of different states and involved, exclusive of interest and cost, more than three thousand dollars, the right of removal being given to the defendant because of such adverse citizenship by the constitution and laws of the United States and particularly by Section 2 of Act of Congress of March 3d, 1887, and the amendments thereto."**

The Supreme Court of Louisiana in passing on this contention said:

> "Referring to the bill of exceptions taken to the refusal of the judge to order the case removed to the federal court, the defendant's counsel argue that the Act of Congress of April 5, 1910, amending the Employers' Liability Act of 1908, only provides that a cause shall not be removed on the ground solely that a federal question is presented in a suit under the Act of Congress.
>
> They contend that the amending Act was not intended to prevent the removal for a cause that existed before and independent of the Act of Congress of 1908, as when the plaintiff and defendant are domiciled in different states. They cite a decision to that effect by Judge Russell of the United States Circuit Court for the Eastern District of Texas, in the case of *Van Brimmer* v. *Texas Railroad Co.*, 190 Fed. 394. The Act of Congress, however, makes no such exception. It provides that 'No case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'
>
> This language was recently construed literally by the United States Supreme Court in case of *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 56 Law Ed. 327, where Mr. Justice Van Devanter expressed the opinion:
>
> 'We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the states, when their jurisdiction, as prescribed by local laws, is adequate to the occasion.'
>
> Since the decision cited by the defendant's counsel was rendered by Judge Russell,

several decisions to the contrary have been rendered by other Circuit Courts of the United States. See *Symonds* v. *Ry. Co.,* 192 Fed. 353; *Strauser* v. *Railway Co.,* 193 Fed. 293; *Lee* v. *Railway Co.,* 193 Fed. 685; *Hulac* v. *C. & N. W. Ry.,* 194 Fed. 747; *McChesney* v. *Railway Co.,* 197 Fed. 85; *De Atley* v. *C. & O. Ry. Co.,* 201 Fed. 591; *Kelley's Adm'r.,* v. *C. & O. Ry.,* 201 Fed. 602.

We conclude that there was no error in refusing to remove the case to the United States District Court."

On June 21, 1915, the Honorable Supreme Court of the United States, in the case of *Kansas City Southern Railway Company,* plaintiff in error, v. *Sam E. Leslie, Adm'r.,* (not yet reported in the reports) set at rest this contention; in the syllabus it said:

"The removal from a state court to a federal court, upon the sole ground of diversity of citizenship, of an action brought under the Federal Employers' Liability Act of April 22, 1908 (35 Sta. at L. 65, Chap. 149, Comp. Sta. 1913, Sec. 8657), as amended by the Act of April 5, 1910 (36 Sta. at L. 291, Chap. 143, Comp. Stat. 1913, Sec. 8662) is prohibited by the provisions both of such amendatory Act and of the Judicial Code, Sec. 28, that no such action brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Assignment of Error No. 5:

> **"The court erred in awarding damages to the administratrix of the deceased without taking into consideration the elements for which damages are awarded under the Act of Congress known as the Employers' Liability Act, approving and awarding her a sum in excess of that which it had allowed to others where the elements of recovery embraced not only loss of support as sued for in this case, but where the elements of recovery also embraced mental anguish, and a recovery for the death of the deceased, and the Supreme Court of the state of Louisiana by failing to give consideration to the elements of damages recoverable under said Act of Congress and by awarding a lump sum to each of the beneficiaries under said Act, dodged the federal question thus presented and decided the same adversely to defendant, contrary to the terms and provisions of said Act of Congress approved April 22d, 1908, amended April 5th, 1910."**

This assignment of error, we submit, is also frivolous. The charge of the law given by the trial judge to the jury will be presumed to have been a correct statement of the law, for there are no bills of exception in the record complaining of any errors in the charge so given.

For the plaintiff in error to now complain of an erroneous apportionment of damages among the beneficiaries, as awarded by the jury, there should of course be bills of exception in the record to show that the law as charged to the jury was erroneous. The record is barren of any such showing.

A reading of the judgment on page 13 of the transcript evidences the fact that the jury took

into consideration the ages of the children (see Tr. 16), and that they apportioned the damages accordingly.

Mrs. Nora M. Jones, the widow, was given five thousand ($5,000.00) dollars; John Edward Jones, the 2-year-old minor child, five thousand ($5,000.00) dollars; Marjorie Jones, 6 years of age, four thousand ($4,000.00) dollars, and Alice Jones, 7 years of age, thirty-five hundred ($3,500.00) dollars.

In *Gulf, C. & St. F. R. Co.* v. *McGinnis,* 228 U. S. 176, 57 Law Ed. 787, the court stated the law to be as follows:

> "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

The amount of damages awarded by verdicts in actions under the Employers' Liability Act does not present a question that the United States Supreme Court will review upon a writ of error.

> "The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to the principles established by *Mich. C. R. Co.* v. *Vreeland,* 227 U. S. 59,

> 57 Law Ed. 417, but it is thought to be apparent as a matter of law that the jury found more than the charge allowed. * * * But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. * * *"

The trial judge approved the verdict of the jury by signing the judgment, as shown on transcript **page 13.**

This assignment of error sets up that "the Supreme Court of the state of Louisiana erred by failing to give consideration to the elements of damages recoverable under said Act of Congress and by awarding a lump sum to each of the beneficiaries under said Act, dodged the federal question thus presented and decided the same adversely to defendant. * * *"

Answering this harsh criticism of the Supreme Court of Louisiana, we submit that the jury in the trial court fixed the *quantum* of damages to be awarded the several beneficiaries by their verdict, which met the approval of the trial judge. The Supreme Court of Louisiana had nothing to do with the *quantum* of damages so awarded, save to review the same as to whether the awards were excessive or inadequate.

In the case of *Taylor* v. *E. C. Palmer & Co.*, 124 La. 531, the court said:

> "The *quantum* of damages awarded by the jury in a case of personal injury will not be disturbed by the Supreme Court, unless the award be manifestly excessive or inadequate."

As no error was assigned to the charge of the trial judge to the jury, the Supreme Court of Louisiana was only called upon to review the *quantum* of damages awarded.

In the very recent case of *Strickland* v. *Louisiana Ry. & N. Co.,* 134 La. 239, the court said:

> "The verdict of a jury is not to be lightly cast aside unless there is some reason for so doing."

The plaintiff in error makes the bald assertion that the Supreme Court of Louisiana failed to take into consideration the Employers' Liability Act in approving and awarding damages that embraced not only the elements of loss of support, but also the elements of mental anguish.

The Louisiana Supreme Court, speaking through Chief Justice Monroe, in its opinion refusing a rehearing, said:

> "* * * the present judgment, being governed by the federal statute, allows nothing for any suffering of the deceased or for the mental anguish of the plaintiffs, and though it includes nothing in the way of punitory damages."

This assignment of error is clearly without merit.

We submit that the writ of error sued out in this cause was manifestly for delay, and with great respect we ask the Honorable Supreme Court

of the United States to either dismiss the writ of error herein sued out, or else affirm the judgment of the court below.

Respectfully submitted,

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OTIS W. BULLOCK,
Counsel for the Appellee and Defendant in Error, Mrs. Nora M. Jones, Administratrix.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* JONES, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 492. Argued April 3, 4, 1916.—Decided May 1, 1916.

In the trial of an action under the Federal Employers' Liability Act defendant is denied a Federal right if he is denied a fair opportunity to show, in accordance with proper practice, negligence attributable to the employee in diminution of damages; nor, in the absence of a settled local rule of practice requiring counsel to announce in advance the purpose for which evidence is tendered, can evidence as to contributory negligence be excluded because tendered without notice that it is restricted to diminution of damages.

When evidence can be introduced for one purpose only it is unnecessary for counsel in offering it to go through the idle form of announcing its purpose.

137 Louisiana, 178, reversed.

THE facts, which involve the validity of a judgment for damages recovered by the representative of an employee of an interstate carrier in the state court and under the Federal Liability Act, are stated in the opinion.

Mr. S. W. Moore, with whom *Mr. F. W. Moore* and *Mr. J. D. Wilkinson* were on the brief, for plaintiff in error.

Mr. Leon R. Smith, with whom *Mr. Newton C. Blanchard* and *Mr. Otis W. Bullock* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Claiming under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65; April 5, 1910, c. 143,

36 Stat. 291) defendant in error brought this suit in a state court against the railroad company to recover damages resulting from her husband's death by accident while employed as engineer on a passenger train. A loaded car, having escaped from the switching crew, ran down a long grade, struck his engine with great violence as it was rounding a curve near the Shreveport yard, and killed him.

The company denied negligence on its part but interposed no plea setting up the defense of contributory negligence. A jury found for the administratrix and judgment thereon was affirmed by the Supreme Court of the State.

During cross-examination of the fireman, counsel attempted to show that the engineer was negligent in not having his train under proper control. The court sustained an objection "to any evidence as to contributory negligence as same is not pleaded." Proper exception was taken and duly noted. Thereupon, the record recites, "counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered." Upon rehearing the Supreme Court held evidence of contributory negligence, though not pleaded and inadmissible to defeat a recovery, should have been received in mitigation of damages if offered for that specific purpose. But it said the evidence in question was properly excluded because tendered without restriction.

We have been cited to no authority showing a settled local rule requiring counsel, without inquiry by the court, to announce in advance the purpose for which evidence is tendered. Earlier cases in Louisiana lend support to the contrary and commonly approved practice. *Thompson* v. *Chauveau*, 6 Mart. N. S. 458, 461; *Hitchcock* v. *North*, 5 Robinson, 328, 329; *Fortunich* v. *New Orleans*, 14 La. Ann. 115; *Caspar* v. *Prosdame*, 46 La. Ann. 36. See *McAfee* v. *Crofford*, 13 How. 446, 456; *Buckstaff* v. *Russell*, 151 U. S. 626, 636; *Farnsworth* v. *Nevada Co.*, 102

Fed. Rep. 578, 580; *Hubbard* v. *Allyn*, 200 Massachusetts, 166, 171; *Mighell* v. *Stone*, 175 Illinois, 261, 262.

It is declared by the act of Congress upon which the suit is based:—

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death; the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . ."

Manifestly, under this provision a defendant carrier has the Federal right to a fair opportunity to show in diminution of damages any negligence attributable to the employee.

The state Supreme Court upheld the railway company's claim of right to show contributory negligence under its general denial; but the trial court emphatically denied this and positively excluded all evidence to that end. As, under the Federal statute, contributory negligence is no bar to recovery, the plain purpose in offering the excluded evidence was to mitigate damages. In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the Supreme Court had been sustained, it could have been easily obviated; but counsel had no reason to anticipate such a ruling and certainly, we think, were not required to do so at their peril.

Plaintiff in error has been improperly deprived of a Federal right. The judgment below is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.